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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 110

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEES

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARY Q. HALLOCK, EXECUTRIX, ESTATE OF HENRY HALLOCK, DECEASED

No. 112

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 13, 1939
CERTIORARI GRANTED OCTOBER 9, 1939

SUPREME COURT OF THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 76802

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEES, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Walker H. Nye, Esq. For Commissioner: Eugene G. Smith, Esq.

Docket entries

1934

July 3—Petition received and filed. Taxpayer notified. (Fee paid.)

July 5—Copy of petition served on General Counsel.

Aug. 23—Answer filed by General Counsel.

Aug. 29—Copy of answer served on taxpayer.

Sept. 8—Motion for circuit hearing at Cleveland filed by taxpayer. 9/10/34 granted.

1935

Oct. 14—Motion for leave to file amended answer in lieu of answer filed August 23, 1935, amendment lodged, filed by General Counsel. 10/16/35 granted.

Oct. 21—Hearing set Dec. 9, 1935, at Cleveland, Ohio.

Dec. 12—Hearing had before Mr. Mellott on merits. Submitted. Counsel's motion to consolidate for hearing and decision with dockets 67803 and 76927 granted. Reply to amended answer filed by petitioner. Copy served. Petitioner's brief due January 27, 1936, Commissioner's due Feb. 27, 1936, petitioner's reply 3/13/36.

2 1936

Jan. 4—Transcript of hearing of Dec. 12, 1935, filed.

Jan. 9—Brief filed by taxpayer.

May 19—Opinion rendered, Mr. Mellott, Div. 11. Judgment will be entered for the petitioner.

May 21—Decision entered, Div. 11.

May 28—Motion to vacate decision and for reconsideration filed by General Counsel.

June 5—Order to place on Calendar of 8/5/36 and further ordered that decision of 5/21/36 be vacated, entered.

July 23—Brief on motion by respondent for reconsideration filed by taxpayer. 7/25/36 copy served.

Aug. 5—Hearing had before Mr. Mellott, Div. 11, on Commissioner's motion for reconsideration—denied. Decision to be entered by Mr. Mellott.

Aug. 10—Motion for reconsideration denied and order of deficiency entered.

Aug. 24—Transcript of hearing of August 5, 1936, filed.

Oct. 28—Petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by General Counsel.

1936
Nov. 4—Proof of service filed by General Counsel (3).
Dec. 11—Motion for extension to Jan. 27, 1937, to prepare and transmit record filed by General Counsel.
Dec. 11—Order enlarging time to Jan. 27, 1937, to prepare and transmit record entered.
1937
Jan. 15—Motion for extension to Feb. 27, 1937, to complete and transmit record filed by General Counsel.
Jan. 15—Order enlarging time to Feb. 27, 1937, to prepare evidence and transmit and deliver record sur petition for review entered.
Feb. 18—Motion for extension to March 15, 1937, to complete and transmit record filed by General Counsel.
Feb. 18—Order enlarging time to March 15, 1937, to prepare and deliver record entered.
Feb. 26—Praecipe with proof of service thereon filed by General Counsel.
Mar. 6—Certified copy of stipulation re consolidation and printing of record filed.

3 Before United States Board of Tax Appeals

Docket No. 76803

MARY Q. HALLOCK, EXECUTRIX OF ESTATE OF HENRY HALLOCK, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: Walker H. Nye, Esq. For Commissioner: Eugene G. Smith, Esq.

Docket entries

1934
July 3—Petition received and filed. Taxpayer notified. (Fee paid.)
July 5—Copy of petition served on General Counsel.
Aug. 23—Answer filed by General Counsel.
Aug. 29—Copy of answer served on taxpayer.
Sept. 8—Motion for circuit hearing at Cleveland filed by taxpayer. 9/10/34 granted.
1935
Oct. 21—Hearing set Dec. 9, 1935, at Cleveland, Ohio.
Dec. 12—Hearing had before Mr. Mellott, Div. 11 on merits. Submitted. Motion to consolidate with dockets 76802 and 76927 granted. Petitioner's brief due 1/27/36—respondent's 2/27/36—petitioner's reply 3/13/36.
1936
Jan. 4—Transcript of hearing of Dec. 12, 1935, filed.
Jan. 9—Brief filed by taxpayer.
May 19—Opinion rendered, Mr. Mellott, Div. 11. Judgment will be entered for petitioner.

1936

May 21—Decision entered, Div. 11.

May 28—Motion to vacate decision and for reconsideration filed by General Counsel.

4 June 5—Order to vacate decision and to place proceeding on calendar of August 5, 1936, entered.

July 23—Brief on motion by respondent for reconsideration filed by taxpayer. 7/25/36 copy served.

Aug. 5—Hearing had before Mr. Mellott, Div. 11. Commissioner's motion denied. Decision to be entered.

Aug. 10—Motion for reconsideration denied and order of deficiency entered.

Aug. 24—Transcript of hearing of August 5, 1936, filed.

Oct. 28—Petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by General Counsel.

Nov. 4—Proof of service filed by General Counsel. (2)

Dec. 11—Motion for extension to Jan. 27, 1937, to prepare and transmit record filed by General Counsel.

Dec. 11—Order enlarging time to Jan. 27, 1937, to prepare and transmit record entered.

1937

Jan. 15—Motion for extension to Feb. 27, 1937, to complete and transmit record filed by General Counsel.

Jan. 15—Order enlarging time to Feb. 27, 1937, to prepare and transmit record entered.

Feb. 18—Motion for extension to March 15, 1937, to complete and transmit record filed by General Counsel.

Feb. 18—Order enlarging time to March 15, 1937, to prepare and deliver record entered.

Feb. 26—Praecipe with proof of service thereon filed by General Counsel.

Mar. 6—Certified copy of stipulation re consolidation and printing record filed.

5 Before United States Board of Tax Appeals

Docket No. 76927

I. J. Fulton, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of the Union Trust Company, Successor of the First Trust and Savings Co., Trustee, Cleveland, Ohio, Amended by Order of December 9, 1935, to Read—S. H. Squire, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of the Union Trust Co., Successor of the First Trust and Savings Co., Trustee, Cleveland, Ohio, petitioner

v.

Commissioner of Internal Revenue, respondent

Appearances: For Taxpayer: C. V. Cannon, Esq., Deceased; W. H. Annat, Esq. For Commissioner: Eugene G. Smith, Esq.

Docket entries

1934

July 14—Petition received and filed. Taxpayer notified. (Fee paid.)

July 14—Copy of petition served on General Counsel.

Aug. 23—Answer filed by General Counsel.

Aug. 30—Copy of answer served on taxpayer.

Sept. 12—Motion for circuit hearing at Cleveland filed by taxpayer. 9/13/34 granted.

1935

Oct. 14—Motion for leave to file amended answer in lieu of answer filed August 23, 1935, amendment lodged filed by General Counsel. 10/16/35 granted.

Oct. 21—Hearing set Dec. 9, 1935, at Cleveland, Ohio.

Dec. 2—Notice of appearance of W. H. Annat as counsel for taxpayer filed.

6 Dec. 7—Motion to substitute S. H. Squire, Supt. of Banks of the State of Ohio, in place of I. J. Fulton as petitioner, filed by taxpayer. 12/9/35 granted.

Dec. 12—Hearing had before Mr. Mellott, Div. 11, on merits. Submitted. Motion to consolidate with dockets 76802 and 3 granted. Motion to file reply to amended answer and reply filed by petitioner. Copies served on respondent. Motion to substitute the parties granted. Petitioner's brief due 1/27/36—respondent's due 2/27/36—petitioner's reply due 3/13/36.

1936

Jan. 4—Transcript of hearing of 12/12/35 filed.

Jan. 27—Brief filed by taxpayer. 1/27/36 copy served.

May 19—Opinion rendered, Mr. Mellott, Div. 11. Judgment will be entered for the petitioner.

May 21—Decision entered, Mr. Mellott, Div. 11.

May 28—Motion to vacate decision and reconsideration filed by General Counsel.

June 5—Order to vacate decision and to place on calendar of 8/5/36 entered.

July 23—Brief on motion by respondent for reconsideration filed by taxpayer.

Aug. 5—Hearing had before Mr. Mellott, Div. 11, on Commissioner's motion. Denied. Decision to be entered.

Aug. 10—Motion for reconsideration denied and order of deficiency entered.

Aug. 24—Transcript of hearing August 5, 1936, filed.

Oct. 28—Petition for review by U. S. Circuit Court of Appeals (6) with assignments of error filed by General Counsel.

Nov. 4—Proof of service filed by General Counsel. (2.)

Dec. 11—Motion for extension to Jan. 27, 1937, to prepare and transmit record filed by General Counsel.

Dec. 11—Order enlarging time to Jan. 27, 1937, to prepare and deliver record entered.

1937

Jan. 15—Motion for extension to Feb. 27, 1937, to complete and transmit record filed by Genera Counsel.

1937

7 Jan. 15—Order that time for preparation of evidence and delivery of record sur petition for review be extended to Feb. 27, 1937 entered.

Feb. 18—Motion for extension to March 15, 1937 to complete and transmit record filed by General Counsel.

Feb. 18—Order enlarging time to March 15, 1937 to prepare and deliver record entered.

Feb. 26—Praecipe with proof of service thereon filed by General Counsel.

Mar. 6—Certified copy of stipulation re consolidation and printing of record filed.

Before United States Board of Tax Appeals

Petition—No. 76802

(Filed July 3, 1934)

The above named petitioners hereby petition for a redetermination of the deficiency and proposed transferee assessment against them set forth by the Commissioner of Internal Revenue in his notice of deficiency and assessment (MT–ET–C1–3175), dated May 22, 1934 and as a basis of their proceeding allege as follows:

1. The petitioners are trustees under a certain insurance trust agreement executed by Henry Hallock under date of September 1, 1925. The residence of Mary Q. Hallock is 12349 Cedar Road, Cleveland Heights, Ohio, and the principal place of business of Central United National Bank of Cleveland is 308 Euclid Avenue, Cleveland, Ohio.

2. The notice of deficiency and assessment (a copy of which is attached and marked Exhibit "A") was mailed to the petitioners on May 22, 1934.

8 3. The taxes in controversy are estate taxes under the Revenue Act of 1926 and the Revenue Act of 1932 upon the Estate of Henry Hallock, who died October 10, 1932, and for $6,096.97.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The inclusion as part of the gross estate of the decedent of the trust fund created by trust agreement between Henry Hallock and The First Trust and Savings Company of Cleveland, Ohio (now The Union Trust Company), dated September 3, 1919, of the alleged value of $70,720, as a transfer to take effect in possession or enjoyment at or after death.

(b) The valuation of the trust estate created by said agreement of September 3, 1919, which trust estate consists of 884 shares of preferred stock of The Ohio Rubber Company, of Willoughby, Ohio, at $70,720.

(c) The inclusion in the gross estate of said trust property at the full valuation thereof, without deduction of the value of the existing

life estate or interest in said trust of Anne Lamson Hallock, the life beneficiary of all of the income thereof.

(d) The disallowance as deductions from the gross estate of debts and charges against the estate of $56,555.81, on the alleged ground that no greater amount may be allowed as such deductions than the value of the probated estate which is being administered by Mary Q. Hallock as executrix.

(e) The assessment against the petitioners, as trustees, beneficiaries and transferees, of the entire alleged deficiency of $6,096.97.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) On September 3, 1919, Henry Hallock and his then wife, Anne Lamson Hallock, in contemplation of a divorce suit about to be instituted by the wife, made a separation and alimony agreement. At the same time, and pursuant to one of the requirements of said agreement, Henry Hallock made a trust agreement with The First Trust and Savings Company of Cleveland, Ohio, as Trustee. The main purpose of the trust agreement was to produce the sum of $500 per month, which the separation agreement provided was to be
9 paid to Anne Lamson Hallock, and eventually there was de-
posited with the trustee 884 shares of 7% preferred stock of The Ohio Rubber Company, it being contemplated that if all dividends were paid on the preferred stock, the gross income of the trust estate would be $6,188 per annum, which would pay the necessary $6,000 per year to Anne Lamson Hallock and leave an additional $188 per year as the estimated amount necessary to pay the trustee's expenses and compensation.

The trust agreement was subject to revocation or modification only with the written assent of both Henry Hallock and Anne Lamson Hallock. By its terms the net income of the trust estate, up to $6,000 per year, is payable to Anne Lamson Hallock for life. The trust agreement contains the following provision as to the disposition of the trust estate upon the death of the life beneficiary:

"C. If and when Anne Lamson Hallock shall die and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

Anne Lamson Hallock obtained a divorce from Henry Hallock on October 28, 1919, is still living and has not remarried. The divorce decree itself made no provision for her by way of alimony or support.

Under the terms of the trust agreement the transfer was entirely completed at the time of the execution thereof, no change in
10 possession or enjoyment took place at the death of the decedent and the transfer of no part of the trust estate took effect in possession or enjoyment at or after the death of the decedent, within the meaning of Section 302 (c) of the Revenue Act of 1926 or any amendments thereof.

(b) The trust agreement of September 3, 1919, and the transfer made thereunder, were supported by adequate and full consideration in money and moneys worth, since they were part of the aforesaid separation agreement, by the terms of which Anne Lamson Hallock released all rights of alimony, dower, inheritance and other rights based on the marital relation between the parties. The trust and separation agreements were made prior to the amendment of Section 303 (d) of the Revenue Act of 1926 by Section 804 of the Revenue Act of 1932.

(c) The 884 shares of 7% preferred stock of the Ohio Rubber Company, of the par value of $100.00 each, which comprise all of said trust estate, are valued by the respondent at $70,720, or $80.00 per share. This valuation is greatly in excess of the actual and fair market value of the stock at the date of decedent's death.

(d) Anne Lamson Hallock, having survived Henry Hallock, her life interest in said trust estate was in existence before and after the decedent's death and still continues. Even if the respondent's determination is partly correct and if any interest in the trust is deemed to have been transferred to take effect in possession or enjoyment at or after the decedent's death, in determining the value of this interest, the value of the life estate or interest of Anne Lamson Hallock should be deducted from the value of the entire trust estate. She was 63 years of age at the date of decedent's death.

(e) Excluding the specific exemptions, the petitioners' return sets up deductions of $171,378.17. Exclusive of the trust estate held under said trust agreement of September 3, 1919, and of a life insurance trust, on account of which $91,468.57 is included in the gross taxable estate and about which there is no controversy, the gross estate amounts to $114,822.36. The respondent had disallowed the deductions in excess of $114,822.36, amounting to
11 $56,555.81, on the ground that no greater sum may be allowed than the probated estate, although the gross taxable estate, both as returned by the petitioners and as determined by the respondent, exceeds the total claimed deductions of $171,378.17.

(f) The value of the life insurance proceeds held by petitioners under the trust agreement of September 1, 1925, is determined at $91,468.57, after the deduction of the insurance exemption of $40,000.

The entire gross estate is determined to be $277,010.93. In no event should the petitioners or said insurance trust estate be liable for a greater part of any deficiency than is produced by the inclusion of said $91,468.57 as part of the gross estate.

Wherefore, the petitioners pray that this Board may hear the proceeding and determine that there is no deficiency in Federal Estate Tax liability of the Estate of Henry Hallock, deceased, and that no assessment may be made against them as Trustees or Transferees, or otherwise.

WALKER H. NYE,
Counsel for Petitioners,
2800 Terminal Tower, Cleveland, Ohio.

[*Duly sworn to by Mary Q. Hallock and E. A. Hanson; jurat omitted in printing.*]

12 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, May 22, 1934.

MT-ET-C1-3175-18th Ohio.
Estate of Henry Hallock.
Date of Death—October 10, 1932.

MARY Q. HALLOCK AND CENTRAL NATIONAL BANK OF CLEVELAND,
Trustees, Beneficiaries, and Transferees, Estate of Henry Hallock, Cleveland, Ohio.

MADAM AND SIRS: Pursuant to Sections 315 (b) and 316 of the Revenue Act of 1926, there is proposed for assessment against you the sum of $6,096.97, plus interest thereon, constituting your liability as transferees and life insurance beneficiaries, by virtue of a trust instrument executed by the decedent on or about September 1, 1925, under which he assigned and delivered to you, as trustees and beneficiaries, certain policies of insurance on his life. This sum represents the Federal estate tax due upon the transfer of the net estate of the decedent, Henry Hallock, who died October 10, 1932, a resident of Shaker Heights, Ohio. The sum of $6,096.97 represents a deficiency which results from changes in the items disclosed in the return filed for this estate as follows:

GROSS ESTATE

	Returned	Determined
Mortgages, notes, cash, and insurance:		
Item 3	$70,025.00	$91,468.57
Transfers:		
By trust instrument executed on September 3, 1919	0.00	70,720.00

The Bureau finds that this transfer comes within the purview of Sections 302 (c) and 302 (d) of the Revenue Act of 1926.

13 DEDUCTIONS

	Returned	Determined
Funeral expenses	$1,056.00	
Executrix' commissions	1,229.00	
Attorney's fees	3,000.00	
Miscellaneous administration expenses	350.00	$114,822.36
Debts of decedent	2,677.12	
Unpaid mortgages	154,666.05	
Support of dependents	8,400.00	

The deductions are adjusted to the determined amount since no greater sum may be allowed than the value of the probated estate which is subject to the payment of these deductions. The computation of the amount determined is as follows:

Gross Estate		$277,010.93
Transfers	$70,720.00	
Insurance payable to beneficiaries other than the estate less $40,000.00	91,468.57	
		162,188.57
		$114,822.36

SUMMARY

Gross estate	$184,847.36	$277,010.93
Deductions (1926 Act)	271,378.17	214,822.36
Net estate (1926 Act)	$0.00	$62,188.57
Gross Estate	$184,847.36	$277,010.93
Deductions (1926 Act)	221,378.17	164,822.36
Net Estate (1932 Act)	$0.00	$112,188.57
Gross tax (1926 Act)	$0.00	$743.77
Total gross taxes (1926 and 1932 Acts)	$0.00	$6,096.97
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00
Net tax	$0.00	$6,096.97
Deficiency		$6,096.97

14 In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed sixty days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the Board within the sixty-day period prescribed.

Where a transferee or beneficiary has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the sixty days prescribed, and an assessment has been made, or where a transferee or beneficiary has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890 (1) waiving the restrictions on the assessment and collection of such deficiency and (2) consenting to the assessment and collection thereof, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce is only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) D. S. BLISS,
Deputy Commissioner.

Enclosure:
Waiver—Form 890.

15 Before United States Board of Tax Appeals

Answer—No. 76802

(Filed August 23, 1934)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Denies that the determination of the deficiency is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a) Admits so much of the subpararaph (a) of the paragraph of the petition numbered 5 as alleges that on September 3, 1919, Henry Hallock, the decedent herein, made a transfer by way of a trust agreement with the First Trust and Savings Company of Cleveland, Ohio, as Trustee, but denies every other allegation contained in subparagraph (a) of the paragraph of the petition numbered 5.

(b) Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered 5.

(c) Admits so much of subparagraph (c) of the paragraph of the petition numbered 5 as alleges that 884 shares of 7% preferred stock of The Ohio Rubber Company, of the par value of $100.00 each, which comprise the said trust estate, was valued by the respondent at $80.00 per share, or a total of $70,720.00, but denies all other

allegations contained in said paragraph (c) of the paragraph of the petition numbered 5.

(d) Denies the allegations contained in subparagraph (d) of the paragraph of the petition numbered 5.

(e) Admits the allegations contained in subparagraph (e) of the paragraph of the petition numbered 5.

(f) Admits so much of subparagraph (f) of the paragraph of the petition numbered 5 as alleges that the respondent has determined the value of the life insurance held by the trust agreement made in September 1, 1925, to be $91,468.57, after allowing the specific
16 exemption of $40,000; that the respondent has determined the entire gross estate to be $277,010.93, but denies every other allegation contained in said subparagraph (f) of the paragraph of the petition numbered 5.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
EUGENE G. SMITH,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Amended answer—No. 76802

(Filed October 16, 1935)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for amended answer to the petition filed by the above-named petitioners, admits, denies, and avers as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

17 4. Denies that the determination of the deficiency is based upon erorrs as alleged in the paragraph of the petition numbered 4.

5 (a) Admits so much of subparagraph (a) of the paragraph of the petition numbered 5 as alleges that on September 3, 1919, Henry Hallock, the decedent herein, created a revocable trust naming the First Trust and Savings Company of Cleveland, Ohio, as trustee, but denies every other allegation contained in subparagraph (a) of the paragraph of the petition numbered 5.

(b) Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered 5.

(c) Admits so much of subparagraph (c) of the paragraph of the petition numbered 5 as alleges that 884 shares of 7% preferred stock of The Ohio Rubber Company, of the par value of $100.00 each, which comprise the said trust estate, was valued by the respondent at $80.00 per share, or a total of $70,720.00, but denies all other allegations contained in said paragraph (c) of the paragraph of the petition numbered 5.

(d) Denies the allegations contained in subparagraph (d) of the petition numbered 5.

(e) Admits the allegations contained in subparagraph (e) of the paragraph of the petition numbered 5.

(f) Admits so much of subparagraph (f) of the paragraph of the petition numbered 5 as alleges that the respondent has determined the value of the life insurance held by the trust agreement made in September 1, 1925, to be $91,468.57, after allowing the specific exemption of $40,000; that the respondent has determined the entire gross estate to be $277,010.93, but denies every other allegation contained in said subparagraph (f) of the paragraph of the petition numbered 5.

6. The facts relied upon by the respondent to show the petitioner's liability as transferees are as follows:

(a) That at the time of the decedent's death his estate was and is now insolvent.

(b) On or about September 1, 1925, the decedent transferred to the petitioners as trustees under a deed of trust dated September 1, 1925, insurance policies taken out on his own life having an aggregate face value of approximately $200,000.00.

18 (c) Upon the decedent's death the proceeds of the said policies were paid to the petitioners as trustees aforesaid, and said proceeds or investments of said proceeds are now in the hands of said trustees, in an amount in excess of the deficiency determined by the Commissioner in the deficiency notice dated May 22, 1934.

(d) That the said insurance passed under contracts executed by the decedent in favor of specific beneficiaries, the petitioners herein, and the petitioners are transferees and beneficiaries within the purview of Section 315 (b) and Section 316 of the Revenue Act of 1926, and are liable in this proceeding as such.

7. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the respondent's determination in this proceeding be approved.

(Signed) Robert H. Jackson,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

Eugene G. Smith,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Reply—No. 76802

(Filed December 12, 1935)

The petitioners, Mary Q. Hallock and Central National Bank of Cleveland, Trustees, by their Attorney, Walker H. Nye, for reply to the amended answer filed by the above-named respondent admit, deny, and aver as follows:

19 6 (a) Admit the allegations contained in subparagraph (a) of the paragraph of the amended answer numbered 6.

6 (b) Admit the allegations contained in subparagraph (b) of the paragraph of the amended answer numbered 6.

6 (c) Admit the allegations in subparagraph (c) of the paragraph of the amended answer numbered 6.

6 (d) Admit so much of subparagraph (d) of the paragraph of the amended answer numbered 6 as states that said insurance passed under contracts executed by the decedent in favor of specific beneficiaries, the petitioners herein, but deny that the petitioners or transferees and beneficiaries within the purview of Section 315 (b) and Section 316 of the Revenue Act of 1926 and that they are liable in this proceeding as such.

Wherefore, petitioners pray this Board find there is no deficiency in Federal Estate Tax liability of the Estate of Henry Hallock, deceased, and that no assessment be made against the petitioners, as trustees or transferees, or otherwise.

(Signed) Walker H. Nye,
2800 Terminal Tower, Cleveland, Ohio,
Counsel for Petitioners.

20 Before United States Board of Tax Appeals

Petition—No. 76803

(Filed July 3, 1934)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-C1-3175), dated May 22, 1934, and as a basis of her proceeding alleges as follows:

1. The petitioner is the duly appointed, qualified, and acting executrix of the estate of Henry Hallock, who died October 10, 1932, under his last will and testament, which was duly admitted to probate and record by the Probate Court of Cuyahoga County, Ohio, on October 28, 1932. The residence of petitioner is 12349 Cedar Road, Cleveland Heights, Ohio.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on May 22, 1934.

3. The taxes in controversy are estate taxes under the Revenue Act of 1926 and the Revenue Act of 1932 upon the Estate of Henry Hallock, deceased, and for $6,096.97.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The inclusion as part of the gross estate of the decedent of the trust fund created by trust agreement between Henry Hallock and The First Trust and Savings Company of Cleveland, Ohio (now The Union Trust Company), dated September 3, 1919, of the alleged value of $70,720, as a transfer to take effect in possession or enjoyment at or after death.

(b) The valuation of the trust estate created by said agreement of September 3, 1919, which trust estate consists of 884 shares of preferred stock of The Ohio Rubber Company, of Willoughby, Ohio, at $70,720.

(c) The inclusion in the gross estate of said trust property at the full valuation thereof, without deduction of the value of the existing life estate or interest in said trust of Anne Lamson Hallock, the life beneficiary of all of the income thereof.

(d) The disallowance as deductions from the gross estate of debts and charges against the estate of $56,555.81, on the alleged ground that no greater amount may be allowed as such deductions
21 than the value of the probated estate which is being administered by the petitioner as executrix.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On September 3, 1919, Henry Hallock and his then wife, Anne Lamson Hallock, in contemplation of a divorce suit about to be instituted by the wife, made a separation and alimony agreement. At the same time, and pursuant to one of the requirements of said agreement, Henry Hallock made a trust agreement with The First Trust and Savings Company of Cleveland, Ohio, as Trustee. The main purpose of the trust agreement was to produce the sum of $500 per month, which the separation agreement provided was to be paid to Anne Lamson Hallock, and eventually there was deposited with the trustee 884 shares of 7% preferred stock of The Ohio Rubber Company, it being contemplated that if all dividends were paid on the preferred stock, the gross income of the trust estate would be $6,188 per annum, which would pay the necessary $6,000 per year to Anne Lamson Hallock and leave an additional $188 per year as the estimated amount necessary to pay the trustee's expenses and compensation.

The trust agreement was subject to revocation or modification only with the written assent of both Henry Hallock and Anne Lamson Hallock. By its terms the net income of the trust estate, up to $6,000 per year, is payable to Anne Lamson Hallock for life. The trust agreement contains the following provision as to the disposition of the trust estate upon the death of the life beneficiary:

"C. If and when Anne Lamson Hallock shall die then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son
22 and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

Anne Lamson Hallock obtained a divorce from Henry Hallock on October 28, 1919, is still living and has not remarried. The divorce decree itself made no provision for her by way of alimony or support.

Under the terms of the trust agreement the transfer was entirely completed at the time of the execution thereof, no change in possession or enjoyment took place at the death of the decedent and the transfer of no part of the trust estate took effect in possession or enjoyment at or after the death of the decedent, within the meaning of Section 302 (c) of the Revenue Act of 1926 or any amendments thereof.

(b) The trust agreement of September 3, 1919, and the transfer made thereunder, were supported by adequate and full consideration in money or moneys worth, since they were part of the aforesaid separation agreement, by the terms of which Anne Lamson Hallock released all rights of alimony, dower, inheritance, and other rights based on the marital relation between the parties. The trust and separation agreements were made prior to the amendment of Section 303 (d) of the Revenue Act of 1926 by Section 804 of the Revenue Act of 1932.

(c) The 884 shares of 7% preferred stock of the Ohio Rubber Company, of the par value of $100.00 each, which comprise all of said trust estate, are valued by the respondent at $70,720, or $80.00 per share. This valuation is greatly in excess of the actual and fair market value of the stock at the date of decedent's death.

(d) Anne Lamson Hallock, having survived Henry Hallock, her life interest in said trust estate was in existence before and after the decedent's death and still continues. Even if the re-
23 spondent's determination is partly correct and if any interest in the trust is deemed to have been transferred to take effect in possession or enjoyment at or after the decedent's death, in determining the value of this interest, the value of the life estate or interest of Anne Lamson Hallock should be deducted from the value of

the entire trust estate. She was 63 years of age at the date of decedent's death.

(e) Excluding the specific exemptions, the petitioner's return sets up deductions of $171,378.17. Exclusive of the trust estate held under said trust agreement of September 3, 1919, and of a life insurance trust, on account of which $91,468.57 is included in the gross taxable estate and about which there is no controversy, the gross estate amounts to $114,822.36. The respondent had disallowed the deductions in excess of $114,822.36, amounting to $56,555.81, on the ground that no greater sum may be allowed than the probated estate, although the gross taxable estate, both as returned by the petitioner and as determined by the respondent, exceeds the total claimed deductions of $171,378.17.

Wherefore the petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in Federal Estate tax liability of the Estate of Henry Hallock, deceased, due from the petitioner.

WALKER H. NYE,
Counsel for Petitioner,
2800 Terminal Tower, Cleveland, Ohio.

[*Duly sworn to by Mary Q. Hallock; jurat omitted in printing.*]

24 *Exhibit A to petition*

MT-ET-C1-3175-18th Ohio.
Estate of Henry Hallock.
Date of Death—October 10, 1932.

MARY Q. HALLOCK,
Executrix, 12349 Cedar Road, Cleveland Heights, Ohio.

MADAM: A deficiency of $6,096.97 in the Federal Estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 60 days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions against the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of

interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 60-day period a petition has not been filed with
25 the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner.

By: (Signed) D. S. BLISS,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890.

The protest relates to the following items:

GROSS ESTATE

Transfers	Returned	Tentatively determined	Determined
By trust instrument dated September 3, 1919	$0.00	$70,720.00	$70,720.00

After a careful consideration of the estate's contentions and in view of all factors of record bearing upon the value of the property transferred, the Bureau finds that the transfer in question comes within the purview of Sections 302 (c) and 302 (d) of the Revenue Act of 1926, and that no change is warranted in the value of the trust property on the date of decedent's death, as tentatively determined.

In the tentative audit deductions were allowed on account of debts and charges against the estate, including an allowance for support of dependents, in the full amount thereof, although they exceeded the value of the estate which was subject to their payment. Since no greater amount may be allowed than the value of the probated estate which is subject to the payment of such items, the following adjustment is made:

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DEDUCTIONS

	Returned	Tentatively determined	Determined
Total not including specific exemption	$171,378.17	$171,378.17	$114,822.36

The computation of the amount determined is as follows:

	Returned	Tentatively determined	Determined
Gross Estate			$277,010.93
Transfers		$70,720.00	
Insurance payable to beneficiaries other than the estate less $40,000.00		91,468.57	162,188.57
			$114,822.36

In view of the foregoing, the following computation shows the estate tax liability of this estate which is hereby made final:

	Returned	Tentatively determined	Determined
Gross Estate	$184,847.36	$277,010.93	$277,010.93
Deductions (1926 Act)	271,378.17	271,378.17	214,822.36
Net estate (1926 Act)	$0.00	$5,632.76	$62,188.57
Gross estate	$184,817.36	$277,010.93	$277,010.93
Deductions (1932 Act)	221,378.17	221,378.17	164,822.36
Net Estate (1932 Act)	$0.00	$55,632.76	$112,118.57
Gross tax (1926 Act)	$0.00	$56.33	$743.77
Total gross taxes (1926 and 1932 Acts)	$0.00	$1,894.29	$6,096.97
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00	0.00
Net tax	$0.00	$1,894.29	$6,096.97
Deficiency			$6,096.97

27 The deficiency bears interest at the rate of six per cent per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is earlier.

Upon receipt of a waiver or upon the expiration of sixty days from the date of this letter, if a petition is not filed with the Board of Tax Appeals, $5,501.95 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Regulations 70 (1929 Edition). If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

Before United States Board of Tax Appeals

Answer—No. 76803

(Filed August 23, 1934)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Denies that the determination of the deficiency is based upon errors as alleged in the paragraph of the petition numbered 4.

28 5. (a) Admits so much of the subparagraph (a) of the paragraph of the petition numbered 5 as alleges that on September 3, 1919, Henry Hallock, the decedent herein, made a transfer by way of a trust agreement with the First Trust and Savings Company of Cleveland, Ohio, as Trustee, but denies every other allegation contained in subparagraph (a) of the paragraph of the petition numbered 5.

(b) Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered 5.

(c) Admits so much of subparagraph (c) of the paragraph of the petition numbered 5 as alleges that 884 shares of 7% preferred stock of The Ohio Rubber Company, of the par value of $100.00 each, which comprise the said trust estate, was valued by the respondent at $80.00 per share, or a total of $70,720.00, but denies all other allegations contained in said subparagraph (c) of the paragraph of the petition numbered 5.

(d) Denies the allegations contained in subparagraph (d) of the paragraph of the petition numbered 5.

(e) Admits the allegations contained in subparagraph (e) of the paragraph of the petition numbered 5.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) Robert H. Jackson,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

Eugene G. Smith,
Special Attorney,
Bureau of Internal Revenue.

29 **Before United States Board of Tax Appeals**

Petition—No. 76927

(Filed July 14, 1934)

The above-named petitioner hereby petitions for a redetermination of the deficiency and proposed transferee assessment against The Union Trust Company, Successor of The First Trust and Sav-

ings Company, set forth by the Commissioner of Internal Revenue in his notice of deficiency and assessment (MT-ET-C1-3175), dated May 22, 1934, and as a basis of his proceeding alleges as follows:

1. The petitioner is the duly appointed, qualified, and acting Superintendent of Banks of the State of Ohio, and, as such, is in charge of the liquidation of The Union Trust Company, Successor of The First Trust and Savings Company, which was and is Trustee under a certain trust agreement executed by Henry Hallock and his then wife, Anne Lamson Hallock, and The First Trust and Savings Company, of Cleveland, Ohio, on September 3, 1919. The principal place of business of The Union Trust Company is Union Trust Building, Cleveland, Ohio.

2. The notice of deficiency and assessment (a copy of which is attached and marked "Exhibit A") was mailed to The Union Trust Company on May 22, 1934.

3. The taxes in controversy are estate taxes under the Revenue Act of 1926 and the Revenue Act of 1932 upon the Estate of Henry Hallock, who died October 10, 1932, and for $6,096.97.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The inclusion as part of the gross estate of the decedent of the trust fund created by trust agreement between Henry Hallock and The First Trust and Savings Company of Clevland, Ohio (now The Union Trust Company), dated September 3, 1919, of the alleged value of $70,720, as a transfer to take effect in possession or enjoyment at or after death.

(b) The valuation of the trust estate created by said agreement of September 3, 1919, which trust estate consists of 884 shares of preferred stock of The Ohio Rubber Company, of Willoughby, Ohio, at $70,720.

30 (c) The inclusion in the gross estate of said trust property at the full valuation thereof, without deduction of the value of the existing life estate or interest in said trust of Anne Lamson Hallock, the life beneficiary of all of the income thereof.

(d) The disallowance as deductions from the gross estate of debts and charges against the estate of $56,555.81, on the alleged ground that no greater amount may be allowed as such deductions than the value of the probated estate which is being administered by Mary Q. Hallock as executrix.

(e) The assessment against the petitioner, as trustee and transferee, of the entire alleged deficiency of $6,096.97.

5. The facts upon which the petitioner relies as the basis of this proceeding are as folows:

(a) On September 3, 1919, Henry Hallock and his then wife, Anne Lamson Hallock, in contemplation of a divorce suit about to be instituted by the wife, made a separation and alimony agreement. At the same time, and pursuant to one of the requirements of said agreement, Henry Hallock made a trust agreement with The First Trust and Savings Company of Cleveland, Ohio, as Trustee. The

main purpose of the trust agreement was to produce the sum of $500 per month, which the separation agreement provided was to be paid to Anne Lamson Hallock, and eventually there was deposited with the trustee 884 shares of 7% preferred stock of The Ohio Rubber Company, it being contemplated that if all dividends were paid on the preferred stock, the gross income of the trust estate would be $6,188 per annum, which would pay the necessary $6,000 per year to Anne Lamson Hallock and leave an additional $188 per year as the estimated amount necessary to pay the trustee's expenses and compensation.

The trust agreement was subject to revocation or modification only with the written assent of both Henry Hallock and Anne Lamson Hallock. By its terms the net income of the trust estate, up to $6,000 per year, is payable to Anne Lamson Hallock for life. The trust agreement contains the following provision as to the disposition of the trust estate upon the death of the life beneficiary:

31 "C. If and when Anne Lamson Hallock shall die then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

Anne Lamson Hallock obtained a divorce from Henry Hallock on October 28, 1919, is still living and has not remarried. The divorce decree itself made no provision for her by way of alimony or support.

Under the terms of the trust agreement the transfer was entirely completed at the time of the execution thereof, no change in possession or enjoyment took place at the death of the decedent and the transfer of no part of the trust estate took effect in possession or enjoyment at or after the death of the decedent, within the meaning of Section 302 (c) of the Revenue Act of 1926 or any amendments thereof.

(b) The trust agreement of September 3, 1919, and the transfer made thereunder, were supported by adequate and full consideration in money and moneys worth, since they were part of the aforesaid separation agreement, by the terms of which Anne Lamson Hallock released all rights of alimony, dower, inheritance, and other rights based on the marital relation between the parties. The trust and separation agreements were made prior to the amendment of Section

303 (d) of the Revenue Act of 1926 by Section 804 of the Revenue Act of 1932.

32 (c) The 884 shares of 7% preferred stock of the Ohio Rubber Company, of the par value of $100.00 each, which comprise all of said trust estate, are valued by the respondent at $70,720, or $80.00 per share. This valuation is greatly in excess of the actual and fair market value of the stock at the date of decedent's death.

(d) Anne Lamson Hallock, having survived Henry Hallock, her life interest in said trust estate was in existence before and after the decedent's death and still continues. Even if the respondent's determination is partly correct and if any interest in the trust is deemed to have been transferred to take effect in possession or enjoyment at or after the decedent's death, in determining the value of this interest, the value of the life estate or interest of Anne Lamson Hallock should be deducted from the value of the entire trust estate. She was 63 years of age at the date of decedent's death.

(e) Excluding the specific exemptions, the return of Mary Q. Hallock, Executrix of the estate of Henry Hallock, deceased, sets up deductions of $171,378.17. Exclusive of the trust estate held under said trust agreement of September 3, 1919, and of a life insurance trust, on account of which $91,468.57 is included in the gross taxable estate and about which there is no controversy, the gross estate amounts to $114,822.36. The respondent had disallowed the deductions in excess of $114,822.36, amounting to $56,555.81, on the ground that no greater sum may be allowed than the probated estate, although the gross taxable estate, both as returned by the executrix and as determined by the respondent, exceeds the total claimed deductions of $171,378.17.

(f) The alleged value of the trust fund created by the trust agreement between Henry Hallock and The First Trust and Savings Company, of Cleveland, Ohio, now The Union Trust Company, dated September 3, 1919, is determined at $70,720.00. The entire gross estate is determined to be $277,010.93. In no event should the petitioner or said trust estate be liable for a greater part of any deficiency than is produced by the inclusion of the actual and fair market value of the stock held under said trust at the time of decedent's death, after deducting therefrom the value of the
33 existing life estate or interest of the said trust of Anne Lamson Hallock, the life beneficiary of all of the income thereof, as part of the gross estate.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in Federal Estate Tax liability of the Estate of Henry Hallock, deceased, and that no assessment may be made against The Union Trust Company as trustee or transferee, or this petitioner, or otherwise.

A. V. Cannon and
W. H. Annat,
Counsel for Petitioner,
1568 Union Trust Bldg., Cleveland, Ohio.

[Duly sworn to by G. H. Robertson; jurat omitted in printing.]

34 *Exhibit A to petition*

Letterhead of

TREASURY DEPARTMENT

WASHINGTON

MT-ET-C1-3175-18th Ohio.
Estate of Henry Hallock.
Date of Death—October 10, 1932.

MAY 22, 1934.

THE UNION TRUST COMPANY, SUCCESSOR OF THE FIRST TRUST AND SAVINGS COMPANY,
Trustee and Transferee, Estate of Henry Hallock, Cleveland, Ohio.

SIRS: Pursuant to Sections 315 (b) and 316 of the Revenue Act of 1926, there is proposed for assessment against you the sum of $6,096.97, plus interest thereon, constituting your liability as a transferee, by virtue of a trust instrument executed by the decedent on or about September 3, 1919, under which the decedent conveyed, assigned, and delivered to you certain property to be held by you as trustee. This sum represents the Federal estate tax due upon the transfer of the net estate of the decedent, Henry Hallock, who died October 10, 1932, a resident of Shaker Heights, Ohio. The sum of $6,096.97 represents a deficiency which results from changes in the items disclosed in the return filed for this estate as follows:

GROSS ESTATE

	Returned	Determined
Mortgages, notes, cash, and insurance		
Item 3	$70,025.00	$91,468.57
Transfers		
By trust instrument executed on September 3, 1919	$0.00	70,720.00

The Bureau finds that this transfer comes within the purview of Sections 302 (c) and 302 (d) of the Revenue Act of 1926.

35

DEDUCTIONS

	Returned	Determined
Funeral expenses	$1,056.00	
Executrix' commissions	1,229.00	
Attorney's fees	3,000.00	
Miscellaneous administration expenses	350.00	$114,822.36
Debts of decedent	2,677.12	
Unpaid mortgages	154,666.05	
Support of dependents	8,400.00	

The deductions are adjusted to the determined amount since no greater sum may be allowed than the value of the probated estate which is subject to the payment of these deductions. The computation of the amount determined is as follows:

	Returned	Determined
Gross Estate		$277,010.93
Transfers	$70,720.00	162,188.57
Insurance payable to beneficiaries other than the estate less $10,000.00	91,468.57	
		$114,822.36

SUMMARY

	Returned	Determined
Gross estate	$184,847.36	$277,010.93
Deductions (1926 Act)	271,378.17	214,822.36
Net estate (1926 Act)	$0.00	$62,188.57
Gross Estate	$184,847.36	$277,010.93
Deductions (1932 Act)	221,378.17	164,822.36
Net Estate (1932 Act)	$0.00	$112,188.57
Gross tax (1926 Act)	$0.00	$743.77
Total gross taxes (1926 and 1932 Acts)	$0.00	$6,096.97
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00
Net tax	$0.00	$6,096.97
Deficiency		$6,096.97

36 In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed sixty days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the Board within the sixty-day period prescribed.

Where a transferee has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the sixty days prescribed, and an assessment has been made, or where a transferee has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890 (1) waiving the restrictions on the assessment and collection of such deficiency and (2) consenting to the assessment and collection thereof, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the

event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) D. S. BLISS,
Deputy Commissioner.

Enclosure:
Waiver—Form 890.

37 Before United States Board of Tax Appeals

Answer—No. 76927

(Filed August 23, 1934)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Denies that the determination of the deficiency is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a) Admits so much of the subparagraph (a) of the paragraph of the petition numbered 5 as alleges that on September 3, 1919, Henry Hallock, the decedent herein, made a transfer by way of a trust agreement with the First Trust and Savings Company of Cleveland, Ohio, as Trustee, but denies every other allegation contained in subparagraph (a) of the paragraph of the petition numbered 5.

(b) Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered 5.

(c) Admits so much of subparagraph (c) of the paragraph of the petition numbered 5 as alleges that 884 shares of 7% preferred stock of The Ohio Rubber Company, of the par value of $100.00 each, which comprise the said trust estate, was valued by the respondent at $80.00 per share, or a total of $70,720.00, but denies all other allegations contained in said subparagraph (c) of the paragraph of the petition numbered 5.

(d) Denies the allegations contained in subparagraph (d) of the paragraph of the petition numbered 5.

(e) Admits the allegations contained in subparagraph (e) of the paragraph of the petition numbered 5.

(f) Admits so much of subparagraph (f) of the paragraph of the petition numbered 5 as alleges that the respondent has deter-
38 mined the value of the trust funds created by the trust agreement between Henry Hallock, the decedent herein, and the First Trust and Savings Company of Cleveland, Ohio, now the Union Trust Company, dated September 3, 1919, to be $70,720.00; that the respondent has determined the entire gross estate to be $277,010.93, but denies every other allegation contained in said subparagraph (f) of the paragraph of the petition numbered 5.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of counsel:
Eugene G. Smith,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Amended answer—No. 76927

(Filed October 16, 1935)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for amended answer to the petition filed by the above-named petitioner, admits, denies, and avers as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

39 2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Denies that the determination of the deficiency is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a) Admits so much of subparagraph (a) of the paragraph of the petition numbered 5 as alleges that on September 3, 1919, Henry Hallock, the decedent herein, created a revocable trust naming the First Trust and Savings Company of Cleveland, Ohio, as trustee, but denies every other allegation contained in subparagraph (a) of the paragraph of the petition numbered 5.

(b) Denies the allegations contained in subparagraph (b) of the paragraph of the petition numbered 5.

(c) Admits so much of subparagraph (c) of the paragraph of the petition numbered 5 as alleges that 884 shares of 7% preferred stock of The Ohio Rubber Company, of the par value of $100.00 each, which comprise the said trust estate, was valued by the respondent at $80.00 per share, or a total of $70,720.00, but denies all other allegations contained in said paragraph (c) of the paragraph of the petition numbered 5.

(d) Denies the allegations contained in subparagraph (d) of the paragraph of the petition numbered 5.

(e) Admits the allegations contained in subparagraph (e) of the paragraph of the petition numbered 5.

(f) Admits so much of subparagraph (f) of the paragraph of the petition numbered 5 as alleges that the respondent has determined the value of the trust funds created by the trust agreement between Henry Hallock, the decedent herein, and the First Trust and Savings Company of Cleveland, Ohio, now the Union Trust Company, dated September 3, 1919, to be $70,720.00; that the respondent has determined the entire gross estate to be $277,010.93, but denies every other allegation contained in said subparagraph (f) of the paragraph of the petition numbered 5.

6. The facts relied upon by the respondent to show the petitioner's liability as transferee are as follows:

40 (a) That at the time of the decedent's death his estate was and is now insolvent.

(b) On or about September 3, 1919, the decedent transferred to the petitioner as trustee under a deed of trust dated September 3, 1919, certain securities of the value as of the date of death of $70,720.00.

(c) Upon the decedent's death the securities, representing the corpus of the said trust estate, were in the hands of the petitioner, and the corpus of the said trust is now in the hands of the petitioner in an amount in excess of the deficiency determined by the Commissioner in the notice of deficiency dated May 22, 1934.

(d) That because of the aforesaid transfer of assets this petitioner is trustee and transferee within the purview of Sections 315 (b) and 316 of the Revenue Act of 1926, and is liable in this proceeding as such.

7. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the respondent's determination in this proceeding be approved.

(Signed) Robert H. Jackson,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:

Eugene G. Smith,
Special Attorney,
Bureau of Internal Revenue.

41 Before United States Board of Tax Appeals

Reply—No. 76927

(Filed December 12, 1935)

The petitioner, S. H. Squire, Superintendent of Banks of the State of Ohio, in charge of the liquidation of The Union Trust Company, Successor of The First Trust and Savings Company, Trustee, Cleveland, Ohio, by his attorney, W. H. Annat, for reply to the amended answer filed by the above named respondent admits, denies and avers as follows:

5. (a) Admits that on September 3, 1919, Henry Hallock, the decedent herein, created a revocable trust, naming The First Trust and Savings Company, of Cleveland, Ohio, as Trustee, but avers that such trust could be revoked only by the written assent of said Henry Hallock and the beneficiary in said trust agreement, Anne Lamson Hallock.

6. (a) Admits the allegations contained in subparagraph (a) of the amended answer numbered 6.

6. (b) Admits the allegations contained in subparagraph (b) of the amended answer numbered 6.

6. (c) Admits the allegations contained in subparagraph (c) of the amended answer numbered 6.

6. (d) Denies the allegations contained in subparagraph (d) of the paragraph numbered 6.

Wherefore, petitioner prays that this Board find that there is no deficiency in federal estate tax liability of the Estate of Henry Hallock, deceased, and that no assessment be made against the Union Trust Company, as trustee or transferee, or against this petitioner, or otherwise.

W. H. Annat,
1568 Union Trust Building, Cleveland, Ohio,
Counsel for Petitioner.

42 Before United States Board of Tax Appeals

Stipulation of facts—No. 76802

(Filed December 12, 1935)

The following is hereby stipulated by and between counsel for the petitioners and for the respondent, without prejudice to the right of either party to offer other testimony:

1. Attached hereto and marked "Exhibit A" is a copy of the trust agreement between Henry Hallock and The First Trust & Savings Company dated September 3, 1919, which created the trust which is the subject of this proceeding.

2. Attached hereto and marked "Exhibit B" is a copy of the separation and alimony agreement dated September 3, 1919, between Henry Hallock and his then wife, Anne Lamson Hallock, pursuant to which the trust agreement marked "Exhibit A" was executed.

3. Henry Hallock and Anne Lamson Hallock were divorced by the Insolvency Court of Cuyahoga County, Ohio, in October of 1919.

* * * * * * *

5. On October 10, 1932, the date of Henry Hallock's death, the trust estate under the trust agreement marked "Exhibit A" consisted of 884 shares of 7% preferred stock of The Ohio Rubber Company. This stock was valued by the respondent at $80.00 per share.

6. Anne Lamson Hallock was 63 years old on October 10, 1932; is still living and has never remarried since her divorce from Henry Hallock.

7. On the basis of the valuation of $70,720.00 put by the respondent on the stock of The Ohio Rubber Company comprising the trust estate and the age of Anne Lamson Hallock at the death of the decedent, the fair value of the life estate or interest of Anne Lamson Hallock in the trust estate was $25,743.00 at the date of the death of Henry Hallock.

8. The debts and deductions of $171,378.17 claimed in the estate tax return filed by petitioners were incurred or contracted bona fide and for an adequate consideration in money or money's worth. The probated estate as listed in the appraisal filed in the Probate Court of Cuyahoga County, Ohio, amounts to $114,822.36. The gross
43 taxable estate, which includes a life insurance trust, as well as the trust which is the subject of this appeal, exceeds the total claimed deductions. The respondent has disallowed the deductions in excess of the probated estate, which excess is $56,555.81.

9. On or about September 1, 1925, the decedent transferred to the petitioners as Trustees under an agreement of trust dated September 1, 1925, insurance policies taken out on his own life having an aggregated face value of approximately $200,000.00. At the time of decedent's death the net value of the insurance held by said Trustees under said insurance trust agreement was about $110,000.00, and the proceeds or investments of the proceeds now in the hands of the Insurance Trustees exceed in amount the deficiency determined by the Commissioner in the deficiency notice dated May 22, 1934. That the said insurance passed under contracts executed by the decedent in favor of specific beneficiaries, the petitioners herein, and that the respondent has proposed for assessment the deficiency herein, pursuant to Sections 315 (b) and 316 of the Revenue Act of 1926.

WALKER H. NYE,
Counsel for Petitioners.
ROBERT H. JACKSON,
Counsel for Respondents.

Exhibit A to stipulation

This indenture made this 3rd day of September 1919 between Henry Hallock, residing at Cleveland, hereinafter designated as "Party of the First Part," and The First Trust & Savings Company, a corporation organized and existing under the laws of the State of Ohio sometimes hereinafter called Trustee, Party of the Second Part, witnesseth that:

Whereas Party of the First Part desires to create a trust of the property and for the purposes as hereinafter mentioned,

44 Now, therefore, this indenture witnesses:

That in consideration of the premises, mutual covenants, and of other good and valuable considerations, and for the sum of One Dollar ($1.00) by each of the parties paid, receipt of which is hereby acknowledged at or before the ensealing and delivery of these presents, Party of the First Part has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto Party of the Second Part, its successors and assigns, all that certain property and securities as more fully set forth in a schedule hereto attached, marked "Exhibit A," and by reference made a part hereof as though fully and at length set forth herein, together with all appurtenances and all estate and rights of Party of the First Part thereto.

To have and to hold, all and singular, the above granted and described property and securities unto said Party of the Second Part, its successors, and assigns, in trust nevertheless for and upon the following uses and purposes and subject to the terms, conditions, powers, agreements, limitations, and instructions hereinafter set forth, to wit:

1. For and during the term of the natural life of Anne Lamson Hallock, the present wife of Party of the First Part, to receive, hold, manage said trust estate, in the manner hereinafter specified; to collect, recover, and receive the rents, issues, interest, dividends, income, and profits thereof, hereinafter called "Income," and after deducting the commissions of the Trustee as hereinafter provided, to deposit the same in a sum not to exceed six thousand dollars ($6,000.00) per annum in a bank account to be opened in Trustee's bank by said Anne Lamson Hallock and to her credit; to pay any sum or sums of income in excess of said sum of Six Thousand Dollars ($6,000.00) per annum, less the amount to be paid under paragraphs two and three, to Party of the First Part, his heirs, executors, administrators, or assigns.

2. Trustee is hereby authorized and empowered to pay out of the income received out of the trust any and all taxes which may become properly payable at any time under the laws of the United States or any state, county, or municipality on said trust property,
45 or for any transfer thereof, or transfer affecting the same: and to affix and cancel tax stamps, in accordance with any of the provisions of any said laws.

3. Trustee shall be entitled to receive as compensation for its service in the administration of this trust, an annual commission of three per cent per annum upon all cash income received by it, and is authorized to deduct such commission before paying the income to the beneficiary hereunder.

4. Trustee by joining in the execution of this instrument signifies and declares its acceptance of the trust herein created, and covenants and agrees with Party of the First Part to faithfully perform all duties to be performed hereunder to the best of its knowledge, skill, and ability; and shall be responsible for the safe custody of the securities and for reasonable care in the disposition of all income which it may receive; but Trustee shall not be responsible for any mistake in judgment or decrease in value of the trust fund.

5. Party of the First Part covenants and agrees to make, execute, and deliver in due form of law, such other and further assignments, conveyances, or other instruments as Trustee may deem required or necessary to effectuate the terms thereof.

6. In the event that Trustee shall request from Party of the First Part written instructions as to the management of said trust, the exercise of any rights granted by right of virtue of said stock or any other security and Party of the First Part shall neglect or refuse to furnish such instructions for a period of thirty (30) days or in the event the Party of the First Part shall be unable, for any reason, to furnish such instructions, Trustee is hereby authorized and empowered to manage said trust estate pursuant to its construction of the within instrument and to its best judgment.

7. Trustee may at any time terminate this agreement in whole by giving thirty (30) days' notice in writing to the Party of the First Part and to beneficiary. Such notice shall be deemed sufficient if addressed to Party of the First Part and the beneficiary at their last places of residence known to Trustee but in no event shall its duties hereunder terminate or its right to the trust fund terminate until a new trustee shall have been selected by the Party of the First
46 Part and beneficiary; and in such event the Trustee shall and will turn over all said securities to said newly selected Trustee whereupon The First Trust & Savings Company shall be entitled to be discharged, released, and relieved from all liability to the parties thereto.

A. Party of the First Part hereby expressly reserves to himself, his heirs, executors, administrators, and assigns the right of increasing the principal of the trust fund from time to time by adding thereto personal property and securities which the Trustee shall receive, hold, and manage in the same manner as herein specified in respect of the property and securities forming the original trust.

B. Party of the First Part during the continuance of the trust for himself, his heirs, executors, administrators, and assigns reserves the right to substitute in place and in lieu of any securities which are or may be at any time part of the said trust fund, new and different

securities which are in the opinion of Trustee, whose opinion shall be absolutely binding, of equal value to the securities so sought by Party of the First Part to be changed.

C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund.. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

D. Party of the First Part reserves to himself, his heirs, executors, administrators, and assigns the right at his option if and in the event said Anne Lamson Hallock shall marry any other person than said Henry Hallock to pay to said Trustee on or within six months
47 after said marriage the sum of Twenty Thousand Dollars ($20,000.00) and deliver over to said Trustee evidence that said Anne Lamson Hallock has so remarried. Upon receipt of said fund and said proof by Trustee, if and in the event said proof is satisfactory to Trustee, then and in such event Trustee shall deliver the said fund of Twenty Thousand Dollars ($20,000.00) to said Anne Lamson Hallock. This trust shall terminate and the disposition of the then accrued income and trust fund shall be made pursuant to Paragraph C above.

This trust may be terminated, modified, altered, canceled or in any way varied by the written consent of the Party of the First Part and beneficiary.

In Witness Whereof the said Party of the First Part for himself, his heirs, executors, administrators, and assigns, and said Party of the Second Part, by its officers duly authorized in the premises, for itself, its successors and assigns, have hereunto set their hands and seals at Cleveland, Ohio, on the day and year hereinbefore written.

[SEAL] (Signed) HENRY HALLOCH, *Party of the First Part.*
THE FIRST TRUST & SAVINGS COMPANY,
By GEO. N. SHERWIN, *Vice President.*
Attest: R. B. PETTIT, *Asst. Secy.*,
Party of the Second Part.

State of Ohio, Cuyahoga County, *ss:*

Henry Hallock being duly sworn, deposes and says that he is the father of the following-named children, that said children are the only children of the said Henry Hallock, to wit: Levitt Hallock, Helen Hallock.

He further says that he makes this affidavit for the purposes of the within trust agreement.

(Signed) HENRY HALLOCK.

Subscribed and sworn before me by said Henry Hallock this 3rd day of September A. D. 1919.

[SEAL] (Signed) O. O. VROOMAN, *Notary Public.*

48 *Exhibit B to stipulation*

This Agreement made at Cleveland, Ohio, this 3rd day of September 1919, by and between Henry Hallock and Anne Lamson Hallock, Husband and Wife, witnesseth that:

Whereas unfortunate differences have arisen between the parties hereto, rendering it impossible hereafter for them to live together and said parties have agreed upon immediate separation, and

Whereas, said Anne Lamson Hallock purposes to sue said Henry Hallock, for divorce, and

Whereas, Parties are desirous of determining between themselves the question of alimony and financial support,

Now, therefore, in consideration of the premises, said Anne Lamson Hallock hereby releases said Henry Hallock from all obligations for future support for herself; and she does further release and relinquish unto said Henry Hallock, his heirs, executors, administrators, and assigns, all rights and claims by way of dower, inheritance and descent in and to any real property of said Henry Hallock now owned or hereafter acquired, any and all rights or claims to distribute share of his personal estate, now owned or hereafter acquired, and all claims and allowance for years support, and right to reside in his mansion house or other rights or claims of every kind and nature arising or growing out of said marriage relation; and said Anne Lamson Hallock for consideration aforesaid and in consideration of agreements of said Henry Hallock herein contained, does further covenant and agree that she will not in any manner incur or contract any debts on the credit of said Henry Hallock and will not incur any liabilities on his behalf; and that, in case an action for divorce should hereafter be instituted by either Party hereto, she will not ask or apply for any allowance for counsel fees or any alimony either temporary or permanent.

The sums of money herein provided for to be paid by said Henry Hallock shall be in full of all such claims and demands, as well as of support, rights of dower, inheritance, and distributive share.

49 In consideration whereof said Henry Hallock hereby covenants and agrees that said Anne Lamson Hallock, shall have sole and exclusive custody, control, and care of Helen Hallock, daughter of said Parties hereto, and that said Henry Hallock shall and will support said daughter, Helen.

The said Henry Hallock in and for the consideration aforesaid does hereby release and relinquish to said Anne Lamson Hallock,

her heirs, executors, administrators, and assigns, all rights and claims of dower, inheritance, descent, distribution, or other rights and claims in any manner arising and growing out of the marriage relations now existing between said Parties, in or to the estate of said Anne Lamson Hallock, real, personal, or mixed, now owned or hereafter acquired; and by these presents said Henry Hallock shall be forever barred therefrom.

Said Henry Hallock further covenants and agrees that during the pendency of the divorce action to be brought by said Anne Lamson Hallock, he shall and will pay said Anne Lamson Hallock the sum of Five Hundred Dollars ($500.00) per month. When and so soon and if Anne Lamson Hallock secures a decree of divorce from said Henry Hallock, said Henry Hallock shall and will pay said Anne Lamson Hallock the sum of Five Hundred Dollars ($500.00) per month so long as she may live and so long as she does not remarry. Said Henry Hallock shall and will secure payments of said sum of Five Hundred Dollars ($500.00) per month by executing that certain trust deed hereto attached, marked "Exhibit A," by reference made a part hereof as though fully and at length set forth herein, and shall and will forthwith deposit under the terms of said trust agreement Capital Stock in The Ohio Rubber Company, an Ohio corporation, having a face and par value of not less than Thirty Thousand Dollars ($30,000.00) pursuant to terms of said trust agreement, and shall and will pay over to said Anne Lamson Hallock the sum of Five Thousand Dollars ($5,000.00) in cash. On or before the first day of September of each of the years 1920, 1921, 1922, 1923, 1924, 1925, respectively, in equal installments, he shall and will deposit securities approvable by The First Trust and Savings Company as Trustee, having a total face or par value of Sixty Thousand Dollars ($60,000.) until the dividends on said
50 stock and securities so deposited shall and will produce the
sum of Six Thousand Dollars ($6,000.00) per annum. Up to the time when and until said dividends shall equal said sum of Six Thousand Dollars ($6,000.00) per annum or at any time when said income shall not equal Six Thousand Dollars ($6,000.00) per annum, said Henry Hallock shall and will pay monthly to Anne Lamson Hallock the difference between Five Hundred Dollars ($500.00) per month and the then income of said trust fund.

When so soon as and if said Anne Lamson Hallock shall secure a divorce from said Henry Hallock, said Henry Hallock shall and will deed to said Anne Lamson Hallock free and clear of any and all incumbrances the dwelling house on Cornell Road, now occupied by them as a Homestead, together with all household furniture and appurtenances therein situated.

If and in the event said Anne Lamson Hallock shall marry any other person other than said Henry Hallock, then and in such event said Henry Hallock may at his option pay to The First Trust and Savings Company pursuant to terms of attached trust agreement,

the sum of Twenty Thousand Dollars ($20,000.00) in cash and upon said payment The First Trust and Savings Company shall make such disposition of said cash fund and of the securities constituting trust fund and of the income thereof as are in said Paragraphs 7-D and 7-C of said trust agreement provided.

In witness whereof the parties have hereunto set their hands and seals this 3rd day of September A. D. 1919.

(Signed) HENRY HALLOCK,
Party of the First Part.

(Signed) ANNE LAMSON HALLOCK,
Party of the Second Part.

In the presence of:
(Signed) L. A. O'NEIL.
(Signed) A. V. CUNNEY.

51 Before United States Board of Tax Appeals

Stipulation of facts—No. 76803

(Filed December 12, 1935)

The following is hereby stipulated by and between counsel for the petitioner and for the respondent, without prejudice to the right of either party to offer other testimony:

1. Attached hereto and marked "Exhibit A" is a copy of the trust agreement between Henry Hallock and The First Trust & Savings Company dated September 3, 1919, which created the trust which is the subject of this proceeding.

2. Attached hereto and marked "Exhibit B" is a copy of the separation and alimony agreement dated September 3, 1919, between Henry Hallock and his then wife, Anne Lamson Hallock, pursuant to which the trust agreement marked "Exhibit A" was executed.

3. Henry Hallock and Anne Lamson Hallock were divorced by the Insolvency Court of Cuyahoga County, Ohio, in October of 1919.

* * * * * * *

5. On October 10, 1932, the date of Henry Hallock's death, the trust estate under the trust agreement marked "Exhibit A" consisted of 884 shares of 7% preferred stock of The Ohio Rubber Company. This stock was valued by the respondent at $80.00 per share.

6. Anne Lamson Hallock was 63 years old on October 10, 1932; is still living and has never remarried since her divorce from Henry Hallock.

7. On the basis of the valuation of $70,720.00 put by the respondent on the stock of The Ohio Rubber Company comprising the trust estate and the age of Anne Lamson Hallock at the death of the decedent, the fair value of the life estate or interest of Anne Lamson Hallock in the trust estate was $25,743.00 at the date of the death of Henry Hallock.

8. The debts and deductions of $171,378.17 claimed in the estate tax return filed by petitioner were incurred or contracted bona fide and for an adequate consideration in money or moneys worth. The probated estate as listed in the appraisal filed in the Probate Court of Cuyahoga County, Ohio, amounts to $114,822.36. The gross
52 taxable estate, which includes a life insurance trust, as well as the trust which is the subject of this appeal, exceeds the total claimed deductions. The respondent has disallowed the deductions in excess of the probated estate, which excess is $56,555.81.

WALKER H. NYE,
Counsel for Petitioner.
ROBERT H. JACKSON,
Counsel for Respondent.

Exhibits "A" and "B" attached to stipulation in Docket 76802.

Before United States Board of Tax Appeals

Stipulation of facts—No. 76927

(Filed December 12, 1935)

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the following facts are true and that the Board may incorporate the same into its findings of fact, subject, however, to the right of either party at the hearing to introduce other and further evidence not inconsistent with this stipulation:

1. Attached hereto and marked "Exhibit A" is a copy of the trust agreement between Henry Hallock and The First Trust & Savings Company dated September 3, 1919, which created the trust which is the subject of this proceeding.

2. Attached hereto and marked "Exhibit B" is a copy of the separation and alimony agreement dated September 3, 1919, between Henry Hallock and his then wife, Anne Lamson Hallock, pursuant to which the trust agreement marked "Exhibit A" was executed.

53 3. Henry Hallock and Anne Lamson Hallock were divorced by the Insolvency Court of Cuyahoga County, Ohio, on October 28, 1919.

4. On October 10, 1932, the date of Henry Hallock's death, the trust estate under the trust agreement marked "Exhibit A" consisted of 884 shares of 7% preferred stock of The Ohio Rubber Company. This stock was valued by the respondent at $80.00 per share.

5. Anne Lamson Hallock was 63 years old on October 10, 1932; is still living and has never remarried since her divorce from Henry Hallock.

6. On the basis of the valuation of $70,720.00 put by the respondent on the stock of The Ohio Rubber Company comprising the trust

estate and the age of Anne Lamson Hallock at the death of the decedent, the fair value of the life estate or interest of Anne Lamson Hallock in the trust estate was $25,743.00 at the date of the death of Henry Hallock.

7. The debts and deductions of $171,378.17 claimed in the estate tax return filed by petitioner were incurred or contracted bona fide and for an adequate consideration in money or money's worth. The probated estate as listed in the appraisal filed in the Probate Court of Cuyahoga County, Ohio, amounts to $114,822.36. The gross taxable estate asserted by the respondent, in which he includes a certain life insurance trust, as well as the trust which is the subject of this appeal, exceeds the total claimed deductions. The respondent has disallowed the deductions in excess of the valuation of the assets of the probated estate, which excess is $56,555.81. The said insurance passed under contracts executed by the decedent in favor of specific beneficiaries. The petitioner herein, said The Union Trust Company, said The First Trust and Savings Company and said Anne Lamson Hallock were not included or named as or among said specific beneficiaries, and have not and never had any interest therein. The respondent has proposed for assessment the deficiency herein, pursuant to Sections 315 (b) and 316 of the Revenue Act of 1926.

8. The trust created by said trust agreement dated September 3, 1919, has not been terminated, modified, altered, cancelled, or in any way varied by the written assent of said Henry Hallock and
54 Anne Lamson Hallock, or otherwise, and has been ever since it was created and now is in full force and effect.

W. H. Annat,
Counsel for Petitioner.
Robert H. Jackson,
Counsel for Respondent.

Exhibits "A" and "B" attached to stipulation in Docket 76802.

Before United States Board of Tax Appeals

Mary Q. Hallock and Central United National Bank of Cleveland, Trustees, petitioners, et al.[1]

v.

Commissioner of Internal Revenue, respondent

Docket Nos. 76802, 76803, 76927. Promulgated May 19, 1936

1. Gross Estate—Trust.—Decedent transferred a portion of his property to a trustee, the income to be paid to his divorced wife. Trust instrument provided that if beneficiary predeceased him the

[1] Proceedings of the following petitioners are consolidated herewith: Mary Q. Hallock, Executrix of the Estate of Henry Hallock, Deceased; S. H. Squire, Superintendent of Banks of the State of Ohio in Charge of the Liquidation of the Union Trust Co., Successor of the First Trust and Savings Co., Trustee, Cleveland, Ohio.

property was to be delivered over to him, but if he predeceased the beneficiary it was to be delivered over to his children. Beneficiary outlived settlor. Held, that the transfer to the trustee was not
55 "intended to take effect in possesion or enjoyment at or after
his death" and the property transferred is not includable in his gross estate under section 302 (c) of the Revenue Act of 1926. Helvering v. St. Louis Union Trust Co., 296 U. S. 39; and Becker v. St. Louis Union Trust Co., 296 U. S. 48.

2. Id.—The decedent as settlor reserved the power, to be exercised jointly with the beneficiary, to revoke the trust. Rule enunciated in Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, to the effect that property so transfered must be included in gross estate under section 302 (d) of the Revenue Act of 1926, recognized, but held, following Helvering v. Helmholz, 296 U. S. 93, and White v. Poor, 296 U. S. 98, that inasmuch as the transfer was made before the statute was enacted, at which time it was not taxable, the statute cannot be applied retroactively, for to do so would be violative of the Fifth Amendment.

3. Deductions.—Section 303 (a) (1) of the Revenue Act of 1926 applied and held, following Union Guardian Trust Co., Administrator, 32 B. T. A. 996, and Commissioner v. Strauss, 77 Fed. (2d) 401, that the respondent erred in limiting the deductions from the gross estate to a sum no greater "than the value of the probated estate which is subject to the payment of the deductions."

Walker H. Nye, Esq., for the petitioners in Docket Nos. 76802 and 76803.

W. H. Annat, Esq., for the petitioner in Docket No. 76927.

Eugene G. Smith, Esq., for the respondent.

Opinion

(May 19, 1936)

Mellott: The respondent determined a deficiency in estate taxes against the estate of Henry Hallock, in the amount of $6,096.97 under the Revenue Acts of 1926 and 1932. (Docket No. 76803.) A deficiency in the same amount was determined against the petitioners in dockets numbered 76802 and 76927 as transferees. In these
56 proceedings, consolidated for hearing, petitioners seek a re-
determination of the deficiencies. All of the facts are stipulated.

Henry Hallock died October 10, 1932, testate. His widow, Mary Q. Hallock, was duly appointed executrix of his estate. She filed an estate tax return showing no tax to be due. Respondent determined that 884 shares of 7 percent preferred stock of the Ohio Rubber Co., valued at $70,720, should have been included in the estate and accordingly he added such amount. He also reduced the deductions on account of debts and charges against the estate from $171,378.17.

reported by the executrix, to $114,822.36, on the theory, as stated by him in his notice of deficiency, that "no greater amount may be allowed than the value of the probated estate which is subject to the payment of such items."

The facts with reference to the shares of stock of the Ohio Rubber Co. are as follows. On September 3, 1919, Henry Hallock entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500 per month by way of alimony and for the creation of a trust to produce such sum. On the same day Henry Hallock transferred in trust to the First Trust & Savings Co. of Cleveland, Ohio, 884 shares of 7 percent preferred stock of the Ohio Rubber Co. The dividends of such stock amounted to $6,188 per annum, sufficient to pay the necessary $6,000 per year to the beneficiary and leave $188 per year for the expenses and compensation of the trustee. The Union Trust Co. was the successor in trust of the First Trust & Savings Co., and it is now in liquidation by S. H. Squire, Superintendent of Banks of the State of Ohio.

Anne Lamson Hallock secured a divorce from Henry Hallock on October 28, 1919. She is still living and has not remarried. The trust agreement contained the following provision with reference to the disposition of the trust estate:

"C. If and when Anne Lamson Hallock shall die then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said party of the
57 First part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

The respondent concluded that the trust estate amounting to $70,720 came "within the purview of sections 302 (c) and 302 (d) of the Revenue Act of 1926" and added such amount to the gross estate.

The petitioners in Docket No. 76802 are trustees under an agreement of trust dated September 1, 1925, to whom the decedent had transferred certain policies of life insurance taken out on his own life. No issue is involved herein relative to such transfer, but it is stipulated that the proceeds, or the investment of the proceeds in the hands of the trustee, exceed in amount the deficiency determined by the respondent. Thus, if the deficiency is upheld, such petitioners are liable for the tax as transferees.

Of the several errors assigned in the various petitions the following were relied upon at the hearing and upon brief:

(1) The inclusion as part of the gross estate of the decedent of a trust fund created by a trust agreement made by Henry Hallock on September 3, 1919, valued at $70,720.00 as a transfer to take effect in possession or enjoyment at or after death under Sections 302 (c) and 302 (d) of the Revenue Act of 1926.

(2) The inclusion of the trust estate at its full value, without deducting the value of the life estate or interest in the trust of Anne Lamson Hallock, the life beneficiary of all of the income.

(3) The disallowance as deductions from the gross estate of debts and charges of $56,551.81 on the ground that no greater amount may be allowed as deductions than the value of the probated estate administered by the executrix.

58 (4) The assessment against the petitioner, as trustee and transferee, of the entire alleged deficiency of Six Thousand Ninety-Six Dollars and Ninety-Seven Cents ($6,096.97).

The respondent relies upon section 302 of the Revenue Act of 1926, and especially subsections (c) and (d).[2]

Subsection (c), supra, has been construed by the courts in many cases and it is unnecessary for us to discuss it at any considerable length. In the recent case of Helvering v. St. Louis Union Trust Co., 296 U. S. 39, the Court collates the previous decisions and again enunciates the rule that "The event which gives rise to the tax is the death of the decedent, with the resulting transfer of his estate either by will or the law relating to intestacy." The tax is laid "upon the theory that such a transfer is in effect testamentary" but if "no interest in the property involved in a given case pass from the 'possession, enjoyment, or control of the donor at his death,' there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his death." Helvering v. St. Louis Union Trust Co., supra; Becker v. St. Louis Union Trust Co., 296 U. S. 48, and cases cited.

In the instant case it cannot be said that the decedent had transferred his property "in contemplation of or intended to take effect in possession or enjoyment at or after his death." He divested himself of all title and ownership in the shares of stock when he conveyed them to the trustee. He retained "no power to resume

[2] 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

59 ownership, possession, or enjoyment except upon a contingency
in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design, or volition on his part was concerned." (Helvering v. St. Louis Union Trust Co., supra.) The trust instrument provided that "If and when Anne Lamson Hallock shall die * * * the trust shall terminate." She is still alive, and the trust has not yet terminated. The only other provision of the trust instrument providing for the termination of the trust was "by the written assent of [Henry Hallock] and [his former wife] the beneficiary"; but such written assent was never given.

Here, as in the cases cited supra, the decedent had no right in the trust estate which was the subject of testamentary disposition. The trust instrument—and not the death or testament of the decedent—disposed of the corpus of the trust property. It directed that in the event of the death of the settlor—decedent—prior to the death of the beneficiary "payment and delivery over [of any accrued income and the principal of the trust fund] shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part [settlor], share and share alike." By the death of the settlor, who, under the trust instrument had the right to have delivery over of the trust property made to him upon the death of the beneficiary, the son and daughter became vested remaindermen, whereas their interest, prior to the death of their father, had been contingent. But such change is not, in our opinion, the "shifting of an economic benefit of property which is the subject of a death tax." We hold, therefore, that the trust property is not required to be included in the gross estate of the decedent under section 302 (c), supra.

Is section 302 (d) applicable? The trust instrument provides that the "trust may be terminated, modified, altered, canceled, or in any way varied by the written assent of the Party of the first part [settlor-decedent] and beneficiary."

Petitioners concede that, under Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, inasmuch as the settlor in conjunction with the beneficiary might revoke or terminate the trust, the property conveyed in trust, if such conveyance were made after the passage of the act, must needs be included in the estate of the settlor. But is a different rule applicable where, as here, the property was
60 conveyed before the effective date of the act? This question
is answered by the Supreme Court in two recent cases—Helvering v. Helmholz, 296 U. S. 93, affirming the decision of the Court of Appeals for the District of Columbia (75 Fed. (2d) 245) which affirmed the decision of this Board in 28 B. T. A. 165, and White v. Poor, 296 U. S. 98.

In Helvering v. Helmholz, supra, the Court said:

"Another and more serious objection to the application of section 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter, or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death." Reinecke v. Northern Trust Company, 278 U. S. 339. If section 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. Nichols v. Coolidge, 274 U. S. 531.

The above language is clearly applicable in its entirety to the facts of the instant case. It follows that we must hold that the trust property is not includable in the gross estate of the decedent under section 302 (d), supra. Respondent erred in including said property in the trust estate and his action in doing so is disapproved. Our holding upon this question makes it unnecessary to consider the second assignment of error urged by the petitioners.

There remains for our consideration the assignment of error relating to the disallowance by the respondent of deductions on account of debts and charges against the estate in the amount that such charges exceed "the probated estate which is subject to the payment of such items."

Section 303 of the Revenue Act of 1926, part of which is
61 shown in the margin,[3] authorizes the deduction "to the extent * * * incurred or contracted bona fide and for adequate and full consideration in money or money's worth." It is stipulated that "The debts and deductions of $171,378.17 claimed in the estate tax return filed by petitioners were incurred or contracted bona fide and for an adequate consideration in money or money's worth." The respondent directs our attention to no provision of the act limiting the deductions as he attempts to do in his notice of deficiency. The decisions of the courts and of this Board have uniformly permitted the deductions, on the theory that the statute governs and that the department is without power or authority to make a rule to the contrary. Union Guardian Trust Co., Administrator, 32 B. T. A. 996, and Commissioner v. Strauss, 77 Fed. (2d) 401. We hold that the respondent erred in reducing the deductions from $171,378.17 to $114,822.36.

The respondent erred in determining the deficiencies and his action in doing so is set aside.

Judgment will be entered for petitioners.

[SEAL]

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[3] Sec. 303. For the purpose of the tax the value of the net estate shall be determined—
(a) In the case of a resident, by deducting from the value of the gross estate—
(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property (except, in the case of a resident decedent, where such property is not situated in the United States), to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth.

Before United States Board of Tax Appeals

Motion to vacate decision and for reconsideration—Nos. 76802, 76803, 76927

(Filed May 28, 1936)

Comes now the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and moves that the decisions of the Board ordering no deficiency in estate tax in the above-entitled appeal, docket number 76803, entered May 21, 1936, and ordering no liability of the petitioners as transferees in the above-entitled appeals, docket numbers 76802 and 76927,
62 entered May 21, 1936, pursuant to the Board's opinion promulgated May 19, 1936, be vacated and that the opinion of May 19, 1936, be reconsidered.

As grounds for this motion the respondent respectfully calls attention to an apparent conflict in the decision of the Division of the Board in this case with respect to one issue, and two previous decisions by other Divisions of the Board on the same question.

The question involved is whether certain property transferred by decedent by deed to a trustee was, as to the remainder, a transfer intended to take effect in possession or enjoyment at or after death, and so includable in his gross estate under Section 302 (c) of the Revenue Act of 1926. The same question on almost identical facts was considered by the Board in Chemical Bank and Trust Company, et al., Executors v. Commissioner, 25 B. T. A. 1153. There property was transferred by a deed to a trustee to pay the income therefrom to the grantor's estranged wife until her death or the prior termination of the Trust, and then to convey the property to the grantor, if then living, or, if not, to his children. The husband died before the wife and before the termination of the trust. In its opinion the Board said:

"The trust was for the purpose of paying income to the wife for life or until sooner terminated. It was not to continue after her death. Upon its termination the trustee was required to convey the remainder to the grantor, if living, or, if dead, to his children. The inclusion of this remainder in the decedent's gross estate need not depend upon section 302 (d). The transfer of the remainder to the children was one intended to take effect in possession or enjoyment at or after the grantor's death. It was contingent upon his dying before the trust terminated. It vested in the children at his death. His death was the indispensable and intended event which effected the transmission of the remainder from the dead (the husband) to the living (the children). The transfer of the remainder was not a sale for a full and adequate consideration in money or money's worth. The grantor could not sell to himself, and there was no consideration in money or money's worth for the transfer to the children. It was proper for the Commissioner to include the

63 value of this remainder in the decedent's gross estate under section 302 (c) of the Revenue Act of 1926."

The Board also held that the Commissioner did not err in including in the husband's gross estate the value of the entire property at the date of his death where the value of the interest of the wife at the date of the husband's death has not been shown. In the instant case the parties stipulated that the value of the trust estate at the date of the decedent's death was $70,720.00; that on the date of death Anne Lamson Hallock, the decedent's divorced wife, was 63 years old, was still living, and had not remarried; that the fair value of the life estate of Anne Lamson Hallock at the date of death was $25,743.00. Therefore, in this case, the value of the remainder would be the difference between the value of the entire trust and the value of the life estate, or $44,977.00. Under the rule announced by the Board in the Chemical National Bank case, the value of the remainder should be included in the decedent's gross estate.

In a more recent decision promulgated December 20, 1935, after the instant case was submitted, Clarence H. Mackay, et al., Executors v. Commissioner, 33 B. T. A. No. 116, the Board held that as certain trusts could be revoked without the consent of the life tenants, the transfer of these estates was not complete until the death of the settlor, and that the value of the life estate should be included in the decedent's gross estate under Section 302 (c). In reaching this conclusion the Board relied on Reinecke v. Northern Trust Company, 278, U. S. 339, in which the Supreme Court construed a similar provision in the Revenue Act of 1921, and held that as to two of the trusts there involved, although created long before the passage of any statute imposing an estate tax, which is not the fact in the instant proceeding, the value of the corpus should be included in the gross estate. As to these trusts the settlor reserved a power of revocation. A transfer made subject to such a power in the transferor is not complete until his death. In the instant case the decedent held a power to revoke with the consent of the beneficiary, his wife, who was the life tenant. She had no interest in the remainder. Therefore, as to the remainder there was no adverse interest whose consent was required before revocation. The transfer of the remainder was not complete

64 until the death of the settlor. By following the principle of the Board's decision in the Mackay case, the value of the remainder should be included in the decedent's gross estate.

In its opinion in the instant case the Board says:

"By the death of the settlor, who, under the trust had the right to have delivery over of the trust property made to him upon the death of the beneficiary, the son and daughter became vested remaindermen, whereas their interest, prior to the death of their father, had been contingent."

The Board then holds that the property is not required to be included in the gross estate under Section 302 (c) because "such change" is not the "shifting of an economic benefit of property which is the

subject of a death tax." This holding, the respondent respectfully submits, is direc.ly contrary to that in the Chemical Bank case where the identical situation was presented and where the Board said:

"The transfer of the remainder to the children was one intended to take effect in possession or enjoyment at or after the grantor's death. It was contingent upon his dying before the trust terminated. It vested in the children at his death. His death was the indispensable and intended event which effected the transmission of the remainder from the dead (the husband) to the living (the children)."

The law taxes "the interest which ceased by reason of death." Knowlton v. Moore, 178 U. S. 41; Edwards v. Slocum, 264 U. S. 61. What the law taxes is not the property belonging to the decedent at his death, but the transmission of the property from the dead to the living. Saltonstill v. Saltonstall, 276 U. S. 260. These principles are recognized in Reinecke v. Northern Trust Company, supra, and in many decisions of the Board. Klein v. United States, 283 U. S. 232.

Wherefore, it is respectfully prayed that the respondent's motion be granted; that the Board vacate the decisions entered May 21, 1936; that the Board reconsider the opinion promulgated May 19, 1936 and that the opinion be modified to the extent of holding that the value of the remainder should be included in the decedent's gross estate as a transfer intended to take effect in possession or
65 enjoyment at or after death, and that provision be made for entering decision under Rule 50.

(Signed) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

Of Counsel:

EUGENE G. SMITH,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

Order on motion to vacate decision, etc.—Nos. 76802, 76803, 76927

(Entered June 5, 1936)

The respondent having on May 28, 1936, filed a motion to vacate decision and for reconsideration, it is

Ordered that these proceedings be placed upon the day calendar of August 5, 1936, for hearing upon said motion before Division No. 11 of the Board; and, good cause therefor appearing, it is

Further ordered that the decision entered herein May 21, 1936, be and the same hereby is vacated and set aside.

[SEAL] (Signed) ARTHUR J. MELLOTT,
Member.

66 **Before United States Board of Tax Appeals**

Order and decision—No. 76802

(Entered August 10, 1936)

Subsequent to the promulgation of opinion herein on May 19, 1936, directing judgment for the petitioner, and subsequent to the entry of decision on May 21, 1936, the respondent, on May 28, 1936, filed a motion to vacate decision and for reconsideration. Good cause therefor appearing the said decision was, on June 5, 1936, vacated, and the motion with respect to reconsideration was set down for hearing on the day calendar of August 5, 1936.

On August 5, 1936, said motion was duly argued and considered by the presiding member, who thereupon ruled that said motion should be denied. Now, therefore, it is

Ordered that respondent's motion for reconsideration be and the same hereby is denied; and it is

Further ordered and decided: That there is no liability of the petitioners as transferees in respect of the tax of the Estate of Henry Hallock, Deceased.

[SEAL] (Signed) ARTHUR J. MELLOTT,
Member.

Before United States Board of Tax Appeals

Order and decision—No. 76803

(Entered August 10, 1936)

Subsequent to the promulgation of opinion herein on May 19, 1936, directing judgment for the petitioner, and subsequent to the entry of decision on May 21, 1936, the respondent, on May 28, 1936, filed a motion to vacate decision and for reconsideration. Good cause therefor appearing the said decision was, on June 5, 1936, vacated, and the motion with respect to reconsideration was set down for hearing on the day calendar of August 5, 1936.

67 On August 5, 1936, said motion was duly argued and considered by the presiding member, who thereupon ruled that said motion should be denied. Now, therefore, it is

Ordered that respondent's motion for reconsideration be and the same hereby is denied; and it is

Further ordered and decided: that there is no deficiency in estate tax herein.

[SEAL] (Signed) ARTHUR J. MELLOTT,
Member.

Before United States Board of Tax Appeals

Order and decision—No. 76927

(Entered August 10, 1936)

Subsequent to the promulgation of opinion herein on May 19, 1936, directing judgment for the petitioner, and subsequent to the entry of decision on May 21, 1936, the respondent, on May 28, 1936, filed a motion to vacate decision and for reconsideration. Good cause therefor appearing, the said decision was, on June 5, 1936, vacated, and the motion with respect to reconsideration was set down for hearing on the day calendar of August 5, 1936.

On August 5, 1936, said motion was duly argued and considered by the presiding member, who thereupon ruled that said motion should be denied. Now, therefore, it is

Ordered that respondent's motion for reconsideration be and the same hereby is denied; and it is

Further ordered and decided: That there is no liability of the petitioners as transferees in respect of the tax of the Estate of Henry Hallock, Deceased.

[SEAL] (Signed) ARTHUR J. MELLOTT,
Member.

68 Before United States Board of Tax Appeals

Petition for review and assignments of error—No. 76802

(Filed October 28, 1936)

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States. The respondents on review (hereinafter referred to as the taxpayers) are trustees under a certain insurance trust agreement executed by Henry Hallock under

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date of September 1, 1925. The residence of Mary Q. Hallock is 12349 Cedar Road, Cleveland Heights, Ohio, and the principal place of business of Central United National Bank of Cleveland is 308 Euclid Avenue, Cleveland, Ohio.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Sixth Circuit.

II

The nature of the controversy is as follows, to wit:

Henry Hallock died on October 10, 1932, a resident of Cleveland, Ohio, and his surviving widow, Mary Q. Hallock, is the duly qualified and acting executrix of his estate. As such executrix, she filed the Federal Estate tax return for said estate in the office of the Collector of Internal Revenue at Cleveland, Ohio, showing no tax to be due. The Commissioner determined that 884 shares of 7% preferred stock of the Ohio Rubber Company valued at $70,720.00 should have been included in the gross estate and also reduced the deductions on account of debts and charges against the estate from $171,378.17, reported by the executrix, to $114,822.36 on the theory that the deduction for debts should be limited to the value of the assets of the estate liable for the payment of such debts.

69 The facts with reference to the shares of stock of the Ohio Rubber Company are as follows:

On September 3, 1919, Henry Hallock entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500.00 per month by way of alimony and for the creation of a trust to produce such sum. On the same day Henry Hallock transferred in trust to the First Trust and Savings Company of Cleveland, Ohio, 884 shares of 7% preferred stock of the Ohio Rubber Company. The dividends of such stock amounted to $6,188.00 per annum, sufficient to pay the necessary $6,000.00 per year to the beneficiary and leave sufficient for the expenses and compensation of the trustee. The Union Trust Company was the successor in trust of the First Trust and Savings Company and it is now in liquidation by S. H. Squire, Superintendent of Banks of the State of Ohio. Anne Lamson Hallock secured a divorce from Henry Hallock on October 28, 1919. She is still living and has not remarried. At the date of the decedent's death the value of the trust estate was $70,720.00. On the date of the decedent's death, Anne Lamson Hallock, the decedent's divorced wife, was sixty-three years old. The fair value of the life estate of Anne Lamson Hallock at the date of the decedent's death was $25,743.00, and the value of the remainder was $44,977.00. The trust agreement contained the following provisions:

"C. If and when Anne Lamson Hallock shall die then and in such event and thereupon the within trust shall terminate and said Trustee

shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income
70 and principal shall be paid to that child of Henry Hallock then living.

"This trust may be terminated, modified, altered, canceled, or in any way varied by the written assent of the Party of the First Part and beneficiary."

The Commissioner concluded that the transfer of the trust estate came within the purview of Section 302 (c) and (d) of the Revenue Act of 1926 and included the value of the corpus amounting to $70,720.00 in the gross estate.

The taxpayer claimed deduction for debts and charges against the estate in the amount of $171,378.17, the full amount of the debts due. The Commissioner limited the deduction for debts of decedent to the amount of $114,822.36, said amount being the value of the assets of the estate liable for the payment of such debts. These changes resulted in the determination of the deficiency of $6,096.97. The taxpayer filed a petition for redetermination with the United States Board of Tax Appeals and in due course a hearing was had. On May 19, 1936, the Board promulgated its opinion holding that the value of the trust property should not be included in the gross estate of the decedent under Section 302 (c) or section 302 (d), and that the deduction allowable to the estate for debts due by the decedent is not limited to the value of the assets of the estate liable for the payment of such debts, and on May 21, 1936, entered its final order determining that there is no deficiency in estate tax.

On May 28, 1936, the Commissioner filed a motion to vacate the decision and for reconsideration. On June 5, 1936, the Board entered an order vacating its decision entered on May 21, 1936, and placed the case on the day calendar of August 5, 1936, for hearing on said motion. The Commissioner's motion for reconsideration was based on the theory that the property transferred by the decedent was as to the remainder a transfer intended to take effect in possession or enjoyment at or after death and so includible in his gross estate under Section 302 (c) and that the holding of the Board that the property is not required to be included in the gross estate under Section 302 (c) because "such change is not, in our opinion, the

'shifting of an economic benefit of property which is the subject of a death tax'" is contrary to previous decisions of the Board
on the same question. On August 5, 1936, the said motion was
71 duly argued and considered and on August 10, 1936, the
Board denied the Commissioner's motion and entered its final order that there is no deficiency in estate tax.

On or about September 1, 1925, the decedent transferred to the taxpayers as trustees under an agreement of trust dated September 1, 1925, insurance policies taken out on his own life having an aggregate face value of approximately $200,000.00. Upon the death of the decedent the proceeds of said policies were paid to petitioners as trustees aforesaid and at the time of decedent's death the value of the insurance held by said trustees under said insurance trust agreement was approximately $110,000.00, and the proceeds or investments of the proceeds now in the hands of the insurance trustees exceed in amount the deficiency determined by the Commissioner as set forth in the deficiency notice dated May 22, 1934. The said insurance passed under contracts executed by the decedent in favor of specific beneficiaries, the taxpayers herein, and the Commissioner has proposed for assessment the deficiency herein pursuant to Sections 315 (b) and 316 of the Revenue Act of 1926. The following is found in the Board's opinion:

"* * * No issue is involved herein relative to such transfer, but it is stipulated that the proceeds, or the investment of the proceeds in the hands of the trustee, exceed in amount the deficiency determined by the respondent. Thus, if the deficiency is upheld, such petitioners are liable for the tax as transferees."

III

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding that the value of the remainder interest should not be included in the gross estate under the provisions of Section 302 (c) and (d) of the Revenue Act of 1926.

2. The Board of Tax Appeals erred in failing to hold that the value of the remainder should be included in the gross estate under the provisions of Section 302 (c) and (d) of the Revenue Act of 1926.

3. The Board of Tax Appeals erred in holding that the estate is entitled to deduction of the total debts due.

72 4. The Board of Tax Appeals erred in failing to hold that the deduction for debts of decedent is limited to the value of the assets of the estate liable for the payment of such debts.

5. The Board of Tax Appeals erred in determining that there is no deficiency in estate tax due from the taxpayer.

6. The Board of Tax Appeals erred in failing to determine that there is a deficiency in estate tax due from the taxpayer in the amount of $4,051.19.

IV

The Commissioner being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination desires to obtain a review thereof by the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Sixth Circuit, that a transcript of record be prepared in accordance with law and the rules of said court and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Signed) ROBERT H. JACKSON,
Assistant Attorney General,
(Signed) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

Of Counsel:
EUGENE G. SMITH,
Special Attorney,
Bureau of Internal Revenue.

73 [*Duly sworn to by Lewis S. Pendleton; jurat omitted in printing.*]

Before United States Board of Tax Appeals

Notice of filing petition for review—No. 76802

(Filed November 4, 1936)

To CENTRAL UNITED NATIONAL BANK OF CLEVELAND,
308 Euclid Avenue, Cleveland, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 28th day of October 1936 file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

74 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of October 1936.

(Signed) W. E. CALDWELL, JR.,
Respondent on Review.

Before United States Board of Tax Appeals

Notice of filing petition for review—No. 76802

(Filed November 4, 1936)

To WALKER H. NYE, Esq.,
2800 Terminal Tower, Cleveland, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 28th day of October 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of October 1936.

(Signed) WALKER H. NYE,
Attorney for Respondent on Review.

75 Before United States Board of Tax Appeals

Notice of filing petition for review—No. 76802

(Filed November 4, 1936)

To MARY Q. HALLOCK,
12349 Cedar Road, Cleveland Heights, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did on the 28th day of October 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of October 1936.

(Signed) MARY Q. HALLOCK,
Respondent on Review.

76 **Before United States Board of Tax Appeals**

Petition for review and assignments of error—No. 76803

(Filed October 28, 1936)

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes Guy. T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is the duly appointed, qualified, and acting executrix of the Estate of Henry Hallock, Deceased, and as such executrix filed the Federal estate tax return for said estate in the office of the Collector of Internal Revenue for the Eighteenth District of Ohio at Cleveland, Ohio.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Sixth Circuit.

II

The nature of the controversy is as follows, to-wit:

Henry Hallock died on October 10, 1932, a resident of Cleveland, Ohio, and his surviving widow, Mary Q. Hallock, is the duly qualified and acting executrix of his estate. She filed an estate tax return showing no tax to be due. The Commissioner determined that 884 shares of 7% preferred stock of the Ohio Rubber Company valued at $70,720.00 should have been included in the gross estate and also reduced the deductions on account of debts and charges against the estate from $171,378.17, reported by the executrix, to $114,822.36 on the theory that the deduction for debts should be limited to the value of the assets of the estate liable for the payment of such debts.

77 The facts with reference to the shares of stock of the Ohio Rubber Company are as follows:

On September 3, 1919, Henry Hallock entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500.00 per month by way of alimony and for the creation of a trust to produce such sum. On the same day Henry Hallock transferred in trust to the First Trust and Savings

Company of Cleveland, Ohio, 884 shares of 7% preferred stock of the Ohio Rubber Company. The dividends of such stock amounted to $6,188.00 per annum, sufficient to pay the necessary $6,000.00 per year to the beneficiary and leave sufficient for the expenses and compensation of the trustee. The Union Trust Company was the successor in trust of the First Trust and Savings Company and it is now in liquidation by S. H. Squire, Superintendent of Banks of the State of Ohio. Anne Lamson Hallock secured a divorce from Henry Hallock on October 28, 1919. She is still living and has not remarried. At the date of the decedent's death the value of the trust estate was $70,720.00. On the date of the decedent's death, Anne Lamson Hallock, the decedent's divorced wife, was sixty-three years old. The fair value of the life estate of Anne Lamson Hallock at the date of the decedent's death was $25,743.00, and the value of the remainder was $44,977.00. The trust agreement contained the following provisions:

"C. If and when Anne Lamson Hallock shall die then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said
78 entire income and principal shall be paid to that child of Henry Hallock then living.

"This trust may be terminated, modified, altered, canceled or in any way varied by the written assent of the Party of the First Part and beneficiary."

The Commissioner concluded that the transfer of the trust estate came within the purview of Section 302 (c) and (d) of the Revenue Act of 1926 and included the value of the corpus amounting to $70,720.00 in the gross estate.

The taxpayer claimed deduction for debts and charges against the estate in the amount of $171,378.17, the full amount of the debts due. The Commissioner limited the deduction for debts of decedent to the amount of $114,822.36, said amount being the value of the assets of the estate liable for the payment of such debts. These changes resulted in the determination of the deficiency of $6,096.97. The taxpayer filed a petition for redetermination with the United States Board of Tax Appeals and in due course a hearing was had. On May 19, 1936, the Board promulgated its opinion holding that the value of the trust property should not be included in the gross

tate of the decedent under Section 302 (c) or Section 302 (d), and at the deduction allowable to the estate for debts due by the dedent is not limited to the value of the assets of the estate liable for e payment of such debts, and on May 21, 1936, entered its final der determining that there is no deficiency in estate tax.

On May 28, 1936, the Commissioner filed a motion to vacate the cision and for reconsideration. On June 5, 1936, the Board entered an order vacating its decision entered on May 21, 1936, and aced the case on the day calendar of August 5, 1936, for hearing said motion. The Commissioner's motion for reconsideration was sed on the theory that the property transferred by the decedent as as to the remainder a transfer intended to take effect in possion or enjoyment at or after death and so includible in his gross tate under Section 302 (c) and that the holding of the Board that e property is not required to be included in the gross estate under ction 302 (c) because "such change is not, in our opinion, the ifting of an economic benefit of property which is the subject of death tax'" is contrary to previous decisions of the Board on the same question. On August 5, 1936, the said motion was duly argued and considered and on August 10, 1936, the Board denied the Commissioner's motion and entered its final order at there is no deficiency in estate tax.

III

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding that the value of e remainder interest should not be included in the gross estate under e provisions of Section 302 (c) and (d) of the Revenue Act of 1926.
2. The Board of Tax Appeals erred in failing to hold that the value the remainder should be included in the gross estate under the prosions of Section 302 (c) and (d) of the Revenue Act of 1926.
3. The Board of Tax Appeals erred in holding that the estate is titled to deduction of the total debts due.
4. The Board of Tax Appeals erred in failing to hold that the duction for debts of decedent is limited to the value of the assets the estate liable for the payment of such debts.
5. The Board of Tax Appeals erred in determining that there is no ficiency in estate tax due from the taxpayer.
6. The Board of Tax Appeals erred in failing to determine that ere is a deficiency in estate tax due from the taxpayer in the amount $4,051.19.

IV

The Commissioner being aggrieved by the conclusions of law conned in said decision and by the said order of redetermination ires to obtain a review thereof by the United States Circuit Court Appeals for the Sixth Circuit.

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Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Sixth Circuit, that a transcript of record be prepared in accordance with law and the rules of said court and transmitted to the clerk of said court for filing and that ap-
80 propriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Signed) ROBERT H. JACKSON,
Assistant Attorney General.
(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Of Counsel:
EUGENE G. SMITH,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by Lewis A. Pendleton, jurat omitted in printing.*]

81. Before United States Board of Tax Appeals

Notice of filing petition for review—No. 76803

(Filed November 4, 1936)

To WALKER H. NYE,
2800 Terminal Tower, Cleveland, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 28th day of October 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of October 1936.

(Signed) WALKER H. NYE,
Attorney for Respondent on Review.

2 **Before United States Board of Tax Appeals**

Notice of filing petition for review—No. 76803

(Filed November 4, 1936)

To MARY Q. HALLOCK, *Executrix*,
12349 Cedar Road; Cleveland Heights, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 28th day of October 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of October 1936.

(Signed) MARY Q. HALLOCK,
Executrix,
Respondent on Review.

3 **Before United States Board of Tax Appeals**

Petition for review and assignments of error—No. 76927

(Filed October 28, 1936)

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, appointed and holding

office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is the duly appointed, qualified, and acting Superintendent of Banks of the State of Ohio, and as such is in charge of the liquidation of the Union Trust Company, successor of the First Trust and Savings Company, which was and is trustee under a certain trust agreement executed by Henry Hallock and his then wife, Anne Lamson Hallock, and the First Trust and Savings Bank of Cleveland, on September 3, 1919. The principal place of business of Union Trust Company is Union Trust Building, Cleveland, Ohio.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Sixth Circuit.

II.

The nature of the controversy is as follows, to-wit:

Henry Hallock died on October 10, 1932, a resident of Cleveland, Ohio, and his surviving widow, Mary Q. Hallock, is the duly qualified and acting executrix of his estate. As such executrix, she filed the Federal Estate tax return for said estate in the office of the Collector of Internal Revenue at Cleveland, Ohio, showing no tax to be due. The Commissioner determined that 884 shares of 7% preferred stock of the Ohio Rubber Company valued at $70,720.00 should have been included in the gross estate and also reduced the
84 deductions on account of debts and charges against the estate from $171,378.17, reported by the executrix, to $114,822.36 on the theory that the deduction for debts should be limited to the value of the assets of the estate liable for the payment of such debts.

The facts with reference to the shares of stock of the Ohio Rubber Company are as follows:

On September 3, 1919, Henry Hallock entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500.00 per month by way of alimony and for the creation of a trust to produce such sum. On the same day Henry Hallock transferred in trust to the First Trust and Savings Company of Cleveland, Ohio, 884 shares of 7% preferred stock of the Ohio Rubber Company. The dividends of such stock amounted to $6,188.00 per annum, sufficient to pay the necessary $6,000.00 per year to the beneficiary and leave sufficient for the expenses and compensation of the trustee. The Union Trust Company was the successor in trust of the First Trust and Savings Company and it is now in liquidation by the taxpayer, S. H. Squire, Superintendent of Banks of the State of Ohio. Anne Lamson Hallock secured a divorce from Henry Hallock on October 28, 1919. She is still living and has not remarried. At the date of the decedent's death the value of the trust estate was $70,720.00. On the date of the decedent's death, Anne Lamson Hallock, the decedent's divorced wife, was sixty-three years old. The fair value of the life estate of Anne Lamson Hallock at the date of the decedent's death was $25,743.00, and the value of

the remainder was $44,977.00. The trust agreement contained the following provisions:

"C. If and when Anne Lamson Hallock shall die then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock
85 shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

"This trust may be terminated, modified, altered, canceled, or in any way varied by the written assent of the Party of the First Part and beneficiary."

The Commissioner concluded that the transfer of the trust estate came within the purview of Section 302 (c) and (d) of the Revenue Act of 1926 and included the value of the corpus amounting to $70,720.00 in the gross estate.

The taxpayer claimed deduction for debts and charges against the estate in the amount of $171,378.17, the full amount of the debts due. The Commissioner limited the deduction for debts of decedent to the amount of $114,822.36, said amount being the value of the assets of the estate liable for the payment of such debts. These changes resulted in the determination of the deficiency of $6,096.97. The taxpayer filed a petition for redetermination with the United States Board of Tax Appeals and in due course a hearing was had. On May 19, 1936, the Board promulgated its opinion holding that "the value of the trust property should not be included in the gross estate of the decedent under Section 302 (c) or Section 302 (d), and that the deduction allowable to the estate for debts due by the decedent is not limited to the value of the assets of the estate liable for the payment of such debts, and on May 21, 1936, entered its final order determining that there is no deficiency in estate tax.

On May 28, 1936, the Commissioner filed a motion to vacate the decision and for reconsideration. On June 5, 1936, the Board entered an order vacating its decision entered on May 21, 1936, and placed the case on the day calendar of August 5, 1936, for hearing on said motion. The Commissioner's motion for reconsideration was based on the theory that the property transferred by the decedent was as to the remainder a transfer intended to take effect in possession or enjoyment at or after death and so includible in his gross estate under Section 302, (c) and that the holding of the Board that the property is not required to be included in the gross estate

86 under Section 302 (c) because "such change is not, in our opinion, the 'shifting of an economic benefit of property which is the subject of a death tax'" is contrary to previous decisions of the Board on the same question. On August 5, 1936, the said motion was duly argued and considered and on August 10, 1936, the Board denied the Commissioner's motion and entered its final order that there is no deficiency in estate tax.

At the time of the decedent's death his estate was and is now insolvent. On or about September 3, 1919, the decedent created a revocable trust naming the first Trust and Savings Company of Cleveland, Ohio, as trustee and transferred to the taxpayer as trustee certain securities of the value as of the date of death of $70,720.00. Upon the decedent's death the securities representing the corpus of said trust estate were in the hands of the taxpayer and the corpus of said trust is now in the hands of the taxpayer in an amount in excess of the deficiency determined by the Commissioner in the notice of deficiency dated May 22, 1934. That because of the aforesaid transfer of assets the respondent concluded that the taxpayer is a trustee and transferee within the purview of Sections 315 (b) and 316 of the Revenue Act of 1926 and is liable in this proceeding as such.

III

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding that the value of the remainder interest should not be included in the gross estate under the provisions of Section 302 (c) and (d) of the Revenue Act of 1926.

2. The Board of Tax Appeals erred in failing to hold that the value of the remainder should be included in the gross estate under the provisions of Section 302 (c) and (d) of the Revenue Act of 1926.

3. The Board of Tax Appeals erred in holding that the estate is entitled to deduction of the total debts due.

4. The Board of Tax Appeals erred in failing to hold that the deduction for debts of decedent is limited to the value of the assets of the estate liable for the payment of such debts.

5. The Board of Tax Appeals erred in determining that there is no deficiency in estate tax due from the taxpayer.

87 6. The Board of Tax Appeals erred in failing to determine that there is a deficiency in estate tax due from the taxpayer in the amount of $4,051.19.

IV

The Commissioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Sixth Circuit, that a transcript of record be prepared in accordance with law and the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Signed) ROBERT H. JACKSON,
Assistant Attorney General.
(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Of Counsel:
EUGENE G. SMITH,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by Lewis S. Pendleton; jurat omitted in printing.*]

88 Before United States Board of Tax Appeals

Notice of filing petition for review—No. 76927

(Filed November 4, 1936)

To S. H. SQUIRE,
Superintendent of Banks of the State of Ohio,
Union Trust Building, Cleveland, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 28th day of October 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel
for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 30th day of October 1936.

(Signed) S. H. SQUIRE,
(Signed) OSCAR L. COX,
(Signed) W. H. ANNAT,
Respondent on Review.

89 Before United States Board of Tax Appeals

Notice of filing petition for review—No. 76927

(Filed November 4, 1936)

To W. H. ANNAT, Esq.,
1568 Union Trust Building, Cleveland, Ohio.

You are hereby notified that the Commissioner of Internal Revenue did, on the 28th day of October 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Sixth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of October 1936.

(Signed) W. H. ANNAT,
Attorney for Respondent on Review.

90 Before United States Board of Tax Appeals

Praecipe for record

(Filed February 26, 1937)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, copies duly certified as correct of the following documents and records, in the above-entitled cases in connection with the petitions for review by said Circuit Court of Appeals for the Sixth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries before the Board in each case.
2. Pleadings before the Board—
   (a) Petition, including annexed copy of deficiency notice in each case.
   (b) Answer in each case.
   (c) Amended answer in Docket Nos. 76802 and 76927.
   (d) Reply in Docket Nos. 76802 and 76927.
3. Stipulation of facts filed December 12, 1935, in each case.
4. Opinion of the Board.
5. Motion to Vacate Decision and for Reconsideration.

6. Order dated June 5, 1936.
7. Order and Decision dated August 10, 1936.
8. Petitions for Review and Assignments of Error.
9. This praecipe.

(Signed) MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 13th day of February 1937.

(Signed) WALKER H. NYE,
Attorney for Respondent on Review.
(Signed) W. H. ANNAT,
Attorney for Respondent on Review.

91 [Clerk's certificate to foregoing transcript omitted in printing.]

Before United States Board of Tax Appeals

Order enlarging time—No. 76802

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to January 27, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Dec. 11, 1936.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

92 Before United States Board of Tax Appeals

Order enlarging time—No. 76802

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to February 27, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Jan. 15, 1937.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

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Before United States Board of Tax Appeals

Order enlarging time—No. 76802

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to March 15, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Feb. 18, 1937.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

93 Before United States Board of Tax Appeals

Order enlarging time—No. 76803

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to January 27, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Dec. 11, 1936.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Order enlarging time—No. 76803

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to February 27, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Jan. 15, 1937.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as the true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

94 Before United States Board of Tax Appeals

Order enlarging time—No. 76803

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to March 15, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Feb. 18, 1937.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Order enlarging time—No. 76927

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to January 27, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Dec. 11, 1936.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

95 Before United States Board of Tax Appeals

Order enlarging time—No. 76927

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to February 27, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Jan. 15, 1937.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Order enlarging time—No. 76927

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Sixth Circuit, be and it is hereby extended to March 15, 1937.

(Signed) EUGENE BLACK, *Member.*

Dated Washington, D. C., Feb. 18, 1937.

Now, March 12, 1937, the foregoing order enlarging time certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

96 In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Docket No. 76802

Docket No. 76803

Docket No. 76927

Motion to consolidate causes

Now comes the Commissioner of Internal Revenue, petitioner on review in the above-entitled causes by and through his attorneys, James W. Morris, Assistant Attorney General, and Morrison Shafroth, Chief Counsel for the Bureau of Internal Revenue, and moves the Court to pass an order herein that the three causes appearing in the caption hereof be consolidated for the purpose of
97 record, briefing, hearing, argument, and decision and directing the Clerk of this Court to have a single transcript of record printed for all of the said causes and as grounds therefor respectfully represents:

1. That the sole question at issue in all of these causes is the liability of respondents herein for the payment of an estate tax as determined by the Commissioner of Internal Revenue upon the transfer of the net estate of Henry Hallock, deceased.

2. That the essential facts controlling the liability for the tax are the same in each cause.

3. That all the causes set forth in the caption hereof were consolidated for hearing before the United States Board of Tax Appeals and were so heard upon a single record.

4. That the respondents in Docket No. 76802 are trustees under an agreement of trust dated September 1, 1925, to whom the decedent had transferred certain policies of life insurance taken out on his own life. The proceeds of said policies, or the investments of the proceeds now in the hands of the trustees, exceed in amount the deficiency determined by the Commissioner.

5. That the printing of a single transcript of record herein will substantially reduce the cost, will conserve the time of the court and counsel for the parties, and will result in presenting to the court a single record for all of the said causes.

6. That the parties hereto appearing by their respective counsel of record have heretofore stipulated, subject to the approval of this Court, that the review by this Court of the causes appearing in the caption hereof may be had in manner and form as herein moved as is evidenced by stipulation attached hereto and forming a part of this motion.

(Signed) JAMES W. MORRIS,
Assistant Attorney General,
(Signed) MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

98 In United States Circuit Court of Appeals for the Sixth Circuit

[Title omitted.]

Docket No. 76802

Docket No. 76803

Docket, No. 76927

Stipulation to consolidate causes

Now come the parties hereto by their respective counsel of record and subject to the approval of the United States Circuit Court of Appeals for the Sixth Judicial Circuit, stipulate and agree as follows:

That the Federal estate tax liability of the Estate of Henry Hallock as determined by the Commissioner of Internal Revenue is involved in each of the above causes;

99 That the essential facts controlling the liability for the tax are the same in each cause;

That the respondents in Docket No. 76802 are trustees under an agreement of trust dated September 1, 1925, to whom the decedent had transferred certain policies of life insurance taken out on his own life. The proceeds of said policies or the investments of the

proceeds now in the hands of the trustees exceed in amount the deficiency determined by the Commissioner;

That in order to reduce the cost of printing the record herein and to enable the parties to present to the court one printed record, the three causes appearing in the caption hereof be consolidated for the purpose of record, briefing, hearing, argument, and decision in the United States Circuit Court of Appeals.

That a single transcript of record shall be printed for all of the said causes and that said record shall contain the following:

1. The docket entries before the Board in each cause.
2. The pleadings before the Board in each cause.
3. Stipulation of facts filed December 12, 1935, in each cause.
4. Opinion of the Board.
5. Motion to vacate decision and for reconsideration.
6. Order dated June 5, 1936.
7. Order and decision dated August 10, 1936.
8. Petition for review and assignments of error in each cause.
9. This stipulation.
10. Praecipe for Record.

W. H. Annat,
Counsel for Respondent.
Walker H. Nye,
Counsel for Respondents.
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Approved:
Xen Hicks, *Circuit Judge.*

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Causes Argued and Submitted Dec. 13, 1938

Before HICKS, ALLEN, and HAMILTON, J. J.

These causes are argued by Helen R. Carloss for Commissioner of Internal Revenue, and by W. H. Nye and W. H. Annat for Respondents, and are submitted to the Court.

Decree No. 7666

Entered March 13, 1939

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby affirmed.

Decree No. 7667

Entered March 13, 1939

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby affirmed.

Decree No. 7668

Entered March 13, 1939

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

154136—39

United States Circuit Court of Appeals, Sixth Circuit

Nos. 7666, 7667, 7668

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEE, RESPONDENTS

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK, EXECUTRIX, ESTATE OF HENRY HALLOCK, DECEASED, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUCCESSOR OF THE FIRST TRUST & SAVINGS COMPANY, TRUSTEE, CLEVELAND, OHIO, RESPONDENT

On Petition to Review Decisions of the United States Board of Tax Appeals

Decided March 13, 1939

Before HICKS, ALLEN, and HAMILTON, Circuit Judges

HAMILTON, Circuit Judge. Petitions by the Commissioner of Internal Revenue to review orders of the United States Board of Tax Appeals redetermining and disallowing estate taxes of $6,096.97 against the estate of Henry Hallock, deceased, No. 7667, and disallowing a transferee tax for the same amount of the respondents in Nos. 7666 and 7668 as transferees of the estate (34 B. T. A. 575).

The questions for decision are (1) whether, under Section 302 (*c*) of the Revenue Act of 1926 as amended (U. S. C. A., Title 26, Section 411 (c), c. 27, 44 Stat. 9), the value of the remainder interest in a trust estate created by the decedent should be included in his gross estate; (2) whether, under Section 303 of the Revenue Act of 1926 as amended (U. S. C. A., Title 26, Section 412, 47 Stat. 278), there may be deducted from the gross estate as deductions, debts of the estate in excess of the value of its assets which are administered by the executrix under the jurisdiction of the Probate Court.

Henry Hallock died October 10, 1932, testate. His widow, Mary Q. Hallock, respondent, was duly appointed and qualified as executrix of his estate and she filed a non-taxable estate tax return.

On September 3, 1919, Henry Hallock entered into a separation agreement with his then wife, Anne Lamson Hallock, whereby he agreed to pay her during her lifetime $500.00 per month and, to guarantee the payment of this sum, on the same day transferred in trust to the First Trust & Savings Company of Cleveland, Ohio, 884 shares of 7% preferred stock of the Ohio Rubber Company, which was then paying an annual dividend of $6,188.00. The trustee was to receive $188.00 annually for its expenses and commissions. The Union Trust Company was later named successor trustee, and is now in liquidation by S. H. Squire, Superintendent of Banks for the State of Ohio, one of the respondents.

Anne Lamson Hallock was divorced on October 28, 1919. She is still living and has not remarried. The trust agreement contained the following provision for termination and disposition of its corpus:

"C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

"D. Party of the First Part reserves to himself, his heirs, executors, administrators, and assigns the right at his option if and in the event said Anne Lamson Hallock shall marry any other person than said Henry Hallock to pay to said Trustee on or within six months after said marriage the sum of Twenty Thousand Dollars ($20,000.00) and deliver over to said Trustee evidence that said Anne Lamson Hallock has so remarried. Upon receipt of said fund and said proof by Trustee, if and in the event said proof is satisfactory to Trustee, then and in such event Trustee shall deliver the said fund of Twenty Thousand Dollars ($20,000.00) to said Anne Lamson Hallock. This trust shall terminate and the disposition of the then accrued income and trust fund shall be made pursuant to Paragraph C above.

"This trust may be terminated, modified, altered, canceled, or in any way varied by the written consent of the Party of the First Part and beneficiary."

The Commissioner included in decedent's gross estate the stock of the Ohio Rubber Company in the trust and valued it at date of death at $70,720.00 and found a deficiency in tax of $6,096.97. On the basis of this valuation and the age of Anne Lamson Hallock at the

date of decedent's death, he found the fair value of the life estate or her interest in the trust estate to be $25,748.00.

In the return, deductions of $171,378.17 were claimed and the estate was appraised in the Probate Court of Cuyahoga County, at $114,822.36. The Commissioner reduced deductions $56,555.81, the excess over the valuation of the estate in Probate Court. The gross taxable estate determined by the Commissioner included a life insurance trust created by testator, as well as the trust involved in these proceedings. As thus valued, the gross estate exceeds the total claimed deductions.

On September 1, 1925, the decedent transferred to the respondents, Mary Q. Hallock and Central United National Bank of Cleveland, as trustees under an agreement of trust, insurance policies on his life having an aggregate face value of approximately $200,000.00. At the time of decedent's death, the net value of this trust was about $110,000.00 and its proceeds or their investment in the hands of the trustees at the time the Commissioner determined his deficiency exceeded the amount thereof.

The corpus of the insurance trust passed under contracts executed by the decedent in favor of specific beneficiaries, who are respondents in No. 7666.

The Board of Tax Appeals disallowed the deficiency of the Commissioner as determined on the foregoing facts, hence these proceedings for review.

The petitioner insists that the death of the testator was the generating source of new rights to his children under the trust instrument, because until his death there was no assurance they would at any time come into possession or enjoyment of any portion of the trust estate.

The applicable statute is Section 302 (c) of the Revenue Act of 1926, 44 Stat. 9, 70, 26 U. S. C. A. 411 (c), which provides for the inclusion in a taxable estate of a decedent's property transferred "in contemplation of or intended to take effect in possession or enjoyment at or after his death."

The statute intended to levy a tax on property possessed or enjoyed by the decedent in his lifetime having a clear value in money. It does not cover a mere technical interest without regard to a present right to possess or enjoy or without measurable value at date of death.

In the case of Helvering v. St. Louis Union Trust Company, 296 U. S. 39, 47, the trust indenture provided that, "if the daughter (the beneficiary) predecease the grantor, the trust shall terminate and the trust estate be transferred, paid over, and delivered to the grantor, to be his absolutely." With reference to the interest of the grantor it was said: "His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it; that is to say, by converting what was merely possible into an utter im-

ossibility." The court further added: "But here the grantor parted vith the title and all beneficial interest in the property, retaining no ight with respect to it which would pass to any one as a result of is death."

In the case of Becker v. St. Louis Union Trust Company, 296 J. S. 48, 53, the decedent had executed separate declarations of trust n favor of each of his four children. These declarations provided hat if the beneficiary should die before the death of the trus- or" * * * then this trust estate shall thereupon revert to me nd become mine immediately and absolutely, or (b) if I should die efore her death, then this property shall thereupon become hers mmediately and absolutely and be turned over to her and in either ase this trust shall cease." The court said: "The question, therefore, s whether the mere possibility of a reverter stamps the transfer as ne intended to take effect in possession or enjoyment at or after he death of the grantor. The decision just rendered (Helvering v. St. Louis Union Trust Company) answer this question in the nega- ive."

The rights of the beneficiaries and distributees under the trust here n question were fixed by its terms and the rights passed from the rustor at the time of the execution of the trust instrument and, while the death of the trustor definitely fixed the right of his children n the trust estate, it was not the generating source of their rights. Tait v. Safe Deposit & Trust Company of Baltimore, 74 Fed. (2d) 851 (4 C. C. A.); Commissioner v. Grosse, 100 Fed. (2d) 37 (9 C. C. A.).

The petitioner leans heavily on Klein v. United States, 283 U. S. 231, 235, in which case a life estate in land was conveyed to the grantee by deed and provided that upon her death prior to the death f the grantor, the reversion should "remain vested in grantor * * * aid reversion being hereby reserved to said grantor and excepted rom this conveyance," but if the grantee should survive the grantor he should have the land in fee simple. This case is easily distin- uished from the one at bar. There the effect of the deed was to vest nly a life estate in the grantee, the remainder being retained by he grantor so that his death effected a transmission of the larger state to the grantee.

The trust instrument here under consideration contained a condi- ion subsequent. The right of reverter in the grantor was based on he possibility only that he might predecease his wife in which event he title would return to him. He had conveyed his whole interest the estate and had nothing left except a mere possibility of re- erter, too intangible for measurement in money, and over which e had no control.

The second issue for consideration is whether the statute permits a eduction from the gross estate, as defined by the Revenue Law, of alid claims which cannot be paid because they exceed the value of e estate as determined in the jurisdiction of administration. In

the case here the Commissioner has included in the gross estate, proceeds of certain insurance policies on the life of decedent, not subject to the payment of his debts under local law.

Section 301 (a), Revenue Act of 1926, 26 U. S. C. A., Section 410, provides "a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 303 (26 U. S. C. A., Sections 411 and 412)) shall be imposed upon the transfer of the net estate of every decedent." Section 303, as amended, 47 Stat. 280 (26 U. S. C. A. 412), provides in part "for the purpose of the tax the value of the net estate shall be determined * * * (a) in the case of a resident by deducting from the value of the gross estate; such amounts (1) for funeral expenses, (2) for administration expenses, (3) for claims against the estate * * * as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered. * * * The deductions herein allowed in the case of claims against the estate * * * shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate or full consideration in money or money's worth." The statute contains neither patent nor latent ambiguities, and means the same whether read as an excerpt isolated from its context or in pari materia. It is too plain in language to need the aid of contemporaneous administrative construction. Houghton v. Payne, 194 U. S. 88, 104.

The application of the estate tax law presents a simple mathematical calculation to reach its end. On one side is valued certain assets specifically enumerated in the statute; on the other, certain statutory defined deductions. The last subtracted from the first constitutes the net estate which is taxed at given percentages. The elements of both sets of factors are specifically enumerated in the Act and to some extent items going into the gross estate as well as deductions have been arbitrarily chosen by the Congress. The inclusion of insurance in the gross estate is by legislative fiat. The proceeds of such policies are not the property of the deceased and the right to them accrued to individuals named in the policy which right the decedent never possessed. The inclusion by Congress of this class of property as a part of the gross estate of decedent finds its justification in the fact that the income of the decedent paid for the insurance. The taxation of unearned benefits accruing on death is a proper source to which the Government may turn in its need. As a corollary to inclusion of insurance in gross estates, the Congress may have been impelled as a matter of abstract justice to allow the individual beneficiary who is called on to pay the tax to take deductions which may not be basically logical. The fact that the estate may not be called upon to pay the debt is no concern of the courts. The insurance beneficiaries can be called upon to pay the estate tax due the Government if the estate be insolvent. There is no element

of unfairness in allowing debts defined in the statute to be deducted in determining the net estate.

The Commissioner contends in effect that Section 303 (a) should have read into it a proviso limiting the deductions to claims which are actually possible to payment from the assets of the estate. This would make the section in substance provide that only deductions should be permitted for claims against the estate which constitute legally enforceable demands and which are actually payable from its assets.

To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Congress. It is the province of the courts to construe, not to make laws. United States v. Detroit First National Bank, 234 U. S. 245, 262.

The Congress by a simple phrase could have limited deductions from gross estates by excluding such portions as passed unburdened of claims under the laws of the state of domicile. It did not elect to do so, therefore all claims allowable against it by the laws of the jurisdiction where being administered are deductible in determining the net estate. Commissioner v. Windrow, 89 Fed. (2d) 69 (5 C. C. A.); Commissioner v. Ames, 88 Fed. (2d) 338 (5 C. C. A.).

The order of the Board is affirmed.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the cases of Commissioner of Internal Revenue vs. Mary Q. Hallock et al., No. 7666; Commissioner of Internal Revenue vs. Mary Q. Hallock, Executrix, No. 7667; and Commissioner of Internal Revenue vs. S. H. Squire, Superintendent of Banks etc., No. 7668, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 7th day of June, A. D. 1939.

[SEAL]

J. W. Menzies,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1939

1 Supreme Court of the United States

No. 110. October Term, 1939

Order allowing certiorari

Filed October 9, 1939.

The petition herein for a writ of certiorari to the United States rcuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the anscript of the proceedings below which accompanied the petition all be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision this application.

2 Supreme Court of the United States

No. 111. October Term, 1939

Order allowing certiorari

Filed October 9, 1939.

The petition herein for a writ of certiorari to the United States rcuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the anscript of the proceedings below which accompanied the petition all be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision this application.

3 Supreme Court of the United States

No. 112. October Term, 1939

Order allowing certiorari

Filed October 9, 1939.

The petition herein for a writ of certiorari to the United States cuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the nscript of the proceedings below which accompanied the petition ll be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision this application.

[Endorsement on cover:] File Nos. 43,517, 43,518, 43,519. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 110. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. Mary Q. Hallock and Central United National Bank of Cleveland, Trustees. Term No. 111. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. Mary Q. Hallock, Executrix, Estate of Henry Hallock. Deceased. Term No. 112. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. S. H. Squire, Superintendent of Banks of the State of Ohio, etc. Petition for writs of certiorari and exhibit thereto. Filed June 13, 1939. Term Nos. 110 O. T. 1939, 111 O. T. 1939, 112 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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Nos. 110, 111, 112

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEES

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK, EXECUTRIX, ESTATE OF HENRY HALLOCK, DECEASED

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUCCESSOR OF THE FIRST TRUST AND SAVINGS COMPANY, TRUSTEE, CLEVELAND, OHIO

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 110

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v.

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEES

No. 111

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v.

MARY Q. HALLOCK, EXECUTRIX, ESTATE OF HENRY HALLOCK, DECEASED

No. 112

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO IN CHARGE OF LIQUIDATION OF THE UNION TRUST COMPANY, SUCCESSOR OF THE FIRST TRUST AND SAVINGS COMPANY, TRUSTEE, CLEVELAND, OHIO

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays

that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Sixth Circuit, entered in the above-entitled causes on March 13, 1939, affirming decisions of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 54-61) is reported in 34 B. T. A. 575. The opinion of the Circuit Court of Appeals is reported in 102 F. (2d) 1.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 13, 1939 (R. 101). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter vivos* trust which provided for the payment of the income therefrom to the extent of $6,000 a year to his then wife, Anne Lamson Hallock, from whom he was shortly thereafter divorced. Upon the death of Anne Lamson Hallock, or earlier termination of the trust, the principal of the trust was to be delivered to the decedent if he should then be living, or in the event he should not then be living, to the decedent's son and daughter, with further provision in the event either son or daughter should not then be living.

The question is whether the value of the remainder interest in the trust should be included in the decedent's gross estate under Section 302 (c) of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved are set forth in the Appendix, *infra*, pp. 16–21.

STATEMENT

The facts as stipulated (R. 42–54) and as found by the Board of Tax Appeals (R. 54–58) are in substance as follows:

Henry Hallock died October 10, 1932, testate. His widow, Mary Q. Hallock, was duly appointed executrix of his estate. (R. 56.)

On September 3, 1919, Henry Hallock entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500 a month as alimony and for the creation of a trust to produce this sum. On the same day Henry Hallock created a trust of 884 shares of 7% preferred stock of the Ohio Rubber Company, the First Trust & Savings Company of Cleveland, Ohio, being made trustee. The dividends of such stock amounted to $6,188 per annum, which would be sufficient to meet the payment of $6,000 per year to the wife and leave $188 per year

for the expenses and compensation of the trustee. (R. 56.) Any sums of income in excess of $6,000 a year, plus certain expenses, were to be paid to the decedent, his heirs, executors, administrators or assigns. (R. 44.) The decedent reserved for himself, his heirs, executors, administrators and assigns the right to substitute in place and lieu of any securities which are or might be at any time part of the trust fund new and different securities which in the opinion of the trustee were of equal value to the securities sought to be changed. (R. 46.)

The Union Trust Company was the successor in trust of the First Trust & Savings Company, and it is now in liquidation by S. H. Squire, Superintendent of Banks of the State of Ohio. (R. 56.)

The trust agreement contained the following provision with reference to the disposition of the trust estate (R. 46–47):

> C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of

the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

D. Party of the First Part reserves to himself, his heirs, executors, administrators and assigns the right at his option if and in the event said Anne Lamson Hallock shall marry any other person than said Henry Hallock to pay to said Trustee on or within six months after said marriage the sum of Twenty Thousand Dollars ($20,000.00) and deliver over to said Trustee evidence that said Anne Lamson Hallock has so re-married. Upon receipt of said fund and said proof by Trustee, if and in the event said proof is satisfactory to Trustee, then and in such event Trustee shall deliver the said fund of Twenty Thousand Dollars ($20,000.00) to said Anne Lamson Hallock. This trust shall terminate and the disposition of the then accrued income and trust fund shall be made pursuant to Paragraph C above.

This trust may be terminated, modified, altered, canceled or in any way varied by the written consent of the Party of the First Part and beneficiary.

Anne Lamson Hallock secured her divorce in 1919. The trust was in effect at the time of the

decedent's death and Anne Lamson Hallock was still living and had not remarried. (R. 56.)

The executrix of the estate filed an estate tax return showing no tax due. (R. 56.) In the audit of the return the Commissioner contended that the value of the 884 shares of 7% preferred stock of the Ohio Rubber Company, constituting the corpus of the trust, should be included in the gross estate, and increased the gross estate by $70,720. (R. 56.) On the basis of the valuation of $70,720 for the shares and the age of Anne Lamson Hallock at the time of decedent's death, the fair value of the life estate or interest of Anne Lamson Hallock in the trust estate at the date of the decedent's death was $25,743. (R. 53.)[1]

Before the Board the executrix and transferees contended that no part of the value of the corpus of the trust should be included in the gross estate, or, in the alternative, that the value of Anne Lamson Hallock's life interest as of the date of decedent's death should be excluded. (R. 57.) The Board

[1] The Commissioner also made other adjustments, as to which no question is being raised in the present petition for writs of certiorari, and asserted a deficiency of $6,096.97 against the estate of Henry Hallock. A deficiency in like amount was also asserted against Mary Q. Hallock and Central United National Bank of Cleveland, Trustees, as transferees, and another deficiency against S. H. Squire, Superintendent of Banks of the State of Ohio, in charge of liquidation of the Union Trust Company, Successor of the First Trust and Savings Company, Trustee, as transferee. (R. 55.)

held that no part of the value of the trust was to be included, and determined that there was no deficiency. (R. 58-61.)

Upon appeal the Government contended that the value of the corpus less the value of Anne Lamson Hallock's life estate should be included in the gross estate under Section 302 (c). The court below held that the case was controlled by the decisions of this Court in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, and that no part of the value of the corpus should be included.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the remainder interest in the trust should not be included in the gross estate under Section 302 (c) of the Revenue Act of 1926.

2. In determining that there is no deficiency in estate tax.

REASONS FOR GRANTING THE WRIT

1. These cases present an important question of federal estate taxation, the decision of which by the court below is, we submit, in conflict with the decision of this Court in *Klein* v. *United States*, 283 U. S. 231. The problem arises where the decedent has conveyed a life estate and has provided with respect to the remainder that it shall go to him if he survives the life tenant and to named bene-

ficiaries (the life tenant or others) if he does not. The question relates to the taxability of the remainder where the grantor predeceases the life tenant. It is the Government's position that, so far as the remainder is concerned, the conveyance to the beneficiaries is a substitute for testamentary disposition, that it is a transfer intended to, and one which does, take effect in possession or enjoyment at or after the grantor's death, and that hence the remainder is to be included within the grantor's gross estate by virtue of the express terms of the taxing Act.

This conclusion is supported by the unanimous decision of this Court in *Klein* v. *United States,* 283 U. S. 231. In that case the grantor conveyed to his wife by deed a life estate in certain lands, but provided that in the event she survived the grantor she was to take the lands in fee simple. The husband died before the wife. The Commissioner ruled that the transfer of the remainder was one intended to take effect in possession or enjoyment at or after the grantor's death. This Court sustained the Commissioner's determination, saying (283 U. S. at 233–234):

> The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore, was contingent. * * * It is perfectly plain that

> the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. * * *

In the cases at bar the settlor created a trust for the payment of alimony, the payments to serve as satisfaction of any claim of the grantor's wife for support, dower or inheritance (R. 48). Upon the death of the grantor's wife the trust was to terminate and the principal of the trust fund was to be delivered to the grantor (R. 46, par. C). The instrument contained a further provision in the event that the grantor should not be living at the death of his wife. In that event the principal was to go to the children or grandchildren of the grantor, the provision reading as follows (*ibid.*):

> If and in the event said Party of the First Part [settlor] shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

It is apparent that here, as in the *Klein* case, the grantor retained an interest in the property which would vest in enjoyment and possession in the named beneficiaries only by virtue of the death of the grantor. Here the trust served to discharge the grantor's duty of support during the lifetime of his wife or so long as she did not remarry (R. 46–47). Thus even in respect of the life estate the property remained in a substantial sense the grantor's, being applied to the performance of an obligation owed by him. Compare *Douglas* v. *Willcuts*, 296 U. S. 1; *Commissioner* v. *Hyde*, 82 F. (2d) 174 (C. C. A. 2d). When the transfer had served its purpose in respect of the grantor's duty of support, the corpus was to be returned to him. It was only in the event that he should not then be living, and consequently have no further opportunity to make disposition of the remainder as part of his estate, that the remainder was to be conveyed to his children or grandchildren. It is the value of this remainder interest which the Commissioner seeks to tax on the ground that, as was held in the *Klein* case, its transmission from the decedent to the remaindermen was incomplete until decedent's death.

2. The court below was of opinion that the present cases were ruled by *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48. Those cases, decided by a bare majority of the Court, did not overrule the *Klein* case, but sought to distinguish

it. In the first of these two cases the decedent transferred securities in trust, the income to be paid to his daughter during her life, with remainder over to named beneficiaries. The indenture contained a further provision that if the daughter should predecease the grantor the estate was to be paid over to the grantor. This Court, construing the trust instrument, concluded that the grantor retained nothing save a "mere possibility of a reverter", and had no power to resume ownership, possession, or enjoyment "except upon a contingency in the nature of a condition subsequent" (296 U. S. at 43). The *Klein* case was distinguished on the ground that there the remainder became vested in the grantee only "upon the condition precedent that the grantor die during the life of the grantee" (*idem*, p. 45). In the *Becker* case, the trust instrument provided that the grantor's child should receive a stated income, and that if the child should die before the grantor the estate should "thereupon revert" to the grantor, or if the grantor should die before the child, then the property should become the child's immediately and absolutely. This Court, emphasizing the provision that the trust estate should "revert" in case of the predecease of the beneficiary, stated that the question was whether the "mere possibility of a reverter" brings the transfer within the reach of the statute (296 U. S. at 50–51). In this view, it was held that the case was ruled by the decision in

Helvering v. *St. Louis Union Trust Co.*, decided the same day.

If the distinction suggested in the *St. Louis Union Trust Co.* cases—between a vested remainder subject to defeasance by a condition subsequent, and a contingent remainder subject to a condition precedent—be followed, it would appear that the remainder in the present cases is within the latter category and hence within the statute. The remainder limited to the children and grandchildren of the grantor was subject to a condition precedent in addition to the termination of the preceding estate, that is, it was subject to the condition precedent that the settlor die during the continuance of the trust. Consequently, as a matter of classification of estates, the remainder was not vested but contingent. See *Stevens* v. *Van Brocklin*, 295 Ill. 434; *Robinson for an Opinion*, 45 R. I. 137; Restatement of the Law—Property—Future Interests (Parts 1 and 2), pp. 542, 561–564; Restatement of the Law—Trusts, p. 562. Since the remainder would never vest except upon the condition that the settlor die prior to the termination of the trust, and the settlor having so died, his death clearly effected a transmission of the remainder interest. See *Helvering* v. *St. Louis Union Trust Co., supra*, p. 45.

It is submitted, therefore, that the court below misapplied the decisions in the *St. Louis Union Trust Co.* cases.

3. While it is believed that the question of the application of the *Klein* and *St. Louis Union Trust Co.* decisions to the cases at bar merits review by this Court, it is believed that the distinction between those decisions will be found, upon further examination, to be unsatisfactory. The distinction, turning upon the technical forms of conveyance, loses sight of the controlling question under the taxing statute, which is whether the transfer is intended to take effect "in possession or enjoyment" at or after the grantor's death. The statute, speaking in terms of possession or enjoyment, carefully avoids the formal niceties involved in definitions of title. This was recognized by the Court in the *Klein* case, *supra*, at 234, where it was said:

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders.

In an effort to conform to the decisions in the *St. Louis Union Trust Company* cases the Treasury Department amended its regulations (Article 17, Regulations 80, 1937 edition, *infra*, p. 20); under the amended regulation it is necessary to determine whether the death of the decedent constitutes a condition precedent to the passing of property or merely an event extinguishing a possibility of reverter. Under this test the line of demarcation will at times have to be drawn so nicely that the distinction made will seem the merest

quibble. It is submitted that under the statute there is no necessity, and indeed no legitimate occasion, for such distinctions. It is submitted that the decision in the *Klein* case should have controlled the decisions in the *St. Louis Union Trust Company* cases, since in substance the transfers were the same; and that the latter decisions should be overruled.

4. The problem is one which cannot readily be dealt with by amendatory legislation. It would be unsatisfactory to attempt to describe in the statute the numerous limitations of estates by which transfers are made to take effect in possession or enjoyment at or after the death of the grantor. Moreover, the language employed in the statute was taken over by the federal estate tax from the inheritance tax laws of at least 40 states.[2] In *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; and *McCormick* v. *Burnet*, 283 U. S. 784, it was held that a transfer with the retention of a life estate in the grantor was not embraced within the statutory language as a transfer intended to take effect in possession or enjoyment at or after the grantor's death. In conjunction with those decisions, the decisions in the *St. Louis Union Trust Company* cases deprive the statutory language of virtually any substance. Particularly

[2] The citations to the state statutes may be found in the Government's brief in *Hassett* v. *Welch*, No. 375, 1937 Term, pp. 20–22.

in view of the present state of the decisions on the question presented in the cases at bar, it would seem appropriate that there be an opportunity to reconsider those decisions before concluding finally that Congress must abandon the statutory language.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JUNE, 1939.

APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. [As amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have

been made in contemplation of death within the meaning of this title.

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.

SEC. 315. [As amended by Section 613 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and Sections 803 and 809 of the Revenue Act of 1932.] (a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he

has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

(U. S. C., Title 26, Sec. 427.)

Sec. 316. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collec-

tion, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the decedent or donor.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(U. S. C., Title 26, Sec. 500.)

Prior to its amendment by Section 803 of the Revenue Act of 1932, the first sentence of Section 302 (c) of the Revenue Act of 1926 had been amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, to read as follows:[8]

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in

[8] The portion added by the amendment of March 3, 1931, is italicized.

case of a bona fide sale for an adequate and full consideration in money or money's worth.

Treasury Regulations 80 promulgated under the Revenue Act of 1934:

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Treasury Regulations 80 (1937 Ed.):

ART. 17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a trans-

fer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), remained in the decedent at the time of his death and the passing therof was subject to the condition precedent of his death. If the tax applies, it does so without regard to the time of the transfer, whether before or after the enactment of the Revenue Act of 1916.

On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event. (See article 15.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

Nos. 110-112

In the Supreme Court of the United States

OCTOBER TERM, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK AND CENTRAL UNITED NATIONAL BANK OF CLEVELAND, TRUSTEES

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY Q. HALLOCK, EXECUTRIX, ESTATE OF HENRY HALLOCK, DECEASED

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

S. H. SQUIRE, SUPERINTENDENT OF BANKS OF THE STATE OF OHIO, ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 38–42) is reported in 34 B. T. A. 575. The opinion of the Circuit Court of Appeals (R. 70–75) is reported in 102 F. (2d) 1.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 13, 1939. (R. 69.) The petition for writs of certiorari was filed June 13, 1939, and granted October 9, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter vivos* trust which provided for the payment of the income therefrom to the extent of $6,000 a year to his then wife, Anne Lamson Hallock, from whom he was shortly thereafter divorced. Upon the death of Anne Lamson Hallock, or earlier termination of the trust, the principal of the trust was to be delivered to the decedent if he should then be living, or in the event he should not then be living, to the decedent's son and daughter, with provision for other disposition in the event that either son or daughter should not then be living.

The question is whether the value of the remainder interest in the trust should be included in the decedent's gross estate under Section 302 (c)

of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved are set forth in the Appendix, *infra*, pp. 35–43.

STATEMENT

The facts as stipulated (R. 28–38) and as found by the Board of Tax Appeals (R. 38–42) are in substance as follows:

Henry Hallock died October 10, 1932, testate. His widow, Mary Q. Hallock, was duly appointed executrix of his estate. (R. 38.)

On September 3, 1919, Henry Hallock, a resident of Cleveland, Ohio, entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500 a month as alimony and for the creation of a trust to produce this sum. On the same day Henry Hallock created a trust of 884 shares of 7 percent preferred stock of the Ohio Rubber Company, the First Trust & Savings Company of Cleveland, Ohio, an Ohio corporation, being made trustee. The dividends of such stock amounted to $6,188 per annum, which would be sufficient to meet the payment of $6,000 per year to the wife and leave $188 per year for the expenses and compensation of the trustee. (R. 29, 39.) Any sums of income in excess of $6,000 a year, plus certain expenses, were to be paid to the

decedent, his heirs, executors, administrators or assigns. (R. 30.) The decedent reserved for himself, his heirs, executors, administrators and assigns the right to substitute in place of any securities which might at any time be part of the trust fund new and different securities which in the opinion of the trustee were of equal value to the securities sought to be replaced. (R. 31–32.)

The Union Trust Company was the successor in trust of the First Trust & Savings Company, and it is now in liquidation by S. H. Squire, Superintendent of Banks of the State of Ohio. (R. 39.)

The trust agreement contained the following provisions with reference to the disposition of the trust estate (R. 32):

> C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part [grantor] if he then be living any accrued income then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would

have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

D. Party of the First Part reserves to himself, his heirs, executors, administrators, and assigns the right at his option if and in the event said Anne Lamson Hallock shall marry any other person than said Henry Hallock to pay to said Trustee on or within six months after said marriage the sum of Twenty Thousand Dollars ($20,000.00) and deliver over to said Trustee evidence that said Anne Lamson Hallock has so remarried. Upon receipt of said fund and said proof by Trustee, if and in the event said proof is satisfactory to Trustee, then and in such event Trustee shall deliver the said fund of Twenty Thousand Dollars ($20,000.00) to said Anne Lamson Hallock. This trust shall terminate and the disposition of the then accrued income and trust fund shall be made pursuant to Paragraph C above.

This trust may be terminated, modified, altered, canceled or in any way varied by the written consent of the Party of the First Part and beneficiary.

Anne Lamson Hallock secured her divorce in 1919. The trust was in effect at the time of the decedent's death in 1932 and Anne Lamson Hallock was still living and had not remarried. (R. 39.)

The executrix of the estate filed an estate tax return showing no tax due. (R. 38.) In the audit

of the return the Commissioner contended that the value of the 884 shares of 7 per cent preferred stock of the Ohio Rubber Company, constituting the corpus of the trust, should be included in the gross estate, and increased the gross estate by $70,720. (R. 38.) On the basis of the valuation of $70,720 for the shares and the age of Anne Lamson Hallock at the time of decedent's death, the fair value of the life estate or interest of Anne Lamson Hallock in the trust estate at the date of the decedent's death was $25,743. (R. 37.)[1]

Before the Board the executrix and transferees contended that no part of the value of the corpus of the trust should be included in the gross estate, or, in the alternative, that the value f Anne Lamson Hallock's life interest as of the date of decedent's death should be excluded. (R. 40.) The Board held that no part of the value of the trust was to be included, and determined that there was no deficiency. (R. 40–42.)

Upon appeal the Government contended that the value of the corpus less the value of Anne Lamson

[1] The Commissioner also made other adjustments, as to which no question is being raised in this Court, and asserted a deficiency of $6,096.97 against the estate of Henry Hallock. A deficiency in like amount was also asserted against Mary Q. Hallock and Central United National Bank of Cleveland, Trustees, as transferees, and another deficiency against S. H. Squire, Superintendent of Banks of the State of Ohio, in charge of liquidation of the Union Trust Company, Successor of the First Trust and Savings Company, Trustee, as transferee. (R. 38.)

Hallock's life estate should be included in the gross estate under Section 302 (c). The court below held that the case was controlled by the decisions of this Court in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, and that no part of the value of the corpus should be included.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the remainder interest in the trust should not be included in the gross estate under Section 302 (c) of the Revenue Act of 1926.

2. In determining that there is no deficiency in estate tax.

SUMMARY OF ARGUMENT

I

In 1919 the decedent created a trust to remain in effect so long as his wife should live. It provided that the income therefrom should be paid to the wife and the corpus should be returned to him at her death, with provision for the payment of the corpus to his son and daughter if he did not survive the life tenant.

The value of the remainder interest in the trust estate should be included in the decedent's gross estate as a transfer in trust intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act

of 1926, as amended (Appendix, *infra*, p. 35). This is not a case where the decedent made a grant of a vested remainder interest to others, retaining a "mere possibility of a reverter," so that the decisions of this Court in *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, do not control. In this case the death of the decedent was the indispensable and intended event which effected a transmission of the remainder interest from the decedent to his son and daughter. The case is controlled by *Klein* v. *United States*, 283 U. S. 231. Here, as there, the decedent retained a vested interest in the transferred property, and until his death the interests of his son and daughter were contingent as to title, possession and enjoyment. His death was essential to the vesting of the remainder in his son and daughter, and that fact furnishes the justification for the imposition of the tax.

II

In any event, *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.* have adopted a purely formal and unreal test for determining the taxability of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. Those cases are inconsistent with a long line of earlier decisions of the Court and particularly with *Klein* v. *United States*, *supra*. They are contrary to the clear intention of Congress and deprive the statutory provision of virtually any substance. They should be overruled.

ARGUMENT

Introductory—In the cases at bar the decedent in 1919 created a trust for the payment of alimony, the payments to serve as satisfaction of any claim of the grantor's wife for support, dower, or inheritance. Upon the death of the grantor's wife the trust was to terminate and the principal of the trust fund was to be delivered to the grantor. The instrument provided for other disposition in the event that the grantor should not be living at the death of his wife. In that event, the principal was to go to the children or grandchildren of the grantor, the provision reading as follows (R. 32, par. C):

> If and in the event said Party of the First Part [decedent] shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living.

At the decedent's death in October 1932, his divorced wife was still living, and the trust continued in force. The question presented is whether the

value of the trust property, less the value of the life estate, may be included in the decedent's gross estate as a transfer "intended to take effect in possession or enjoyment" at or after the decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926, *infra*.

It is the Government's position that, so far as the remainder is concerned, the conveyance to the beneficiaries was a substitute for testamentary disposition, that it was a transfer intended to, and one which did, take effect in possession or enjoyment at or after the grantor's death, and that hence the remainder must be included within the grantor's gross estate by virtue of the express terms of the taxing Act.

Three recent decisions of this Court bear upon the question here involved: *Klein* v. *United States*, 283 U. S. 231; *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39; and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48. A holding that the present cases are ruled by the *Klein* case would require a decision for the Government; a contrary result would follow if the *St. Louis Trust Co.* cases are applied and deemed to be controlling.

We believe that the instant cases fall within the rule of the *Klein* case rather than within the rule of the *St. Louis Trust Co.* cases, and we will undertake to support that position in Point I. However, we believe that the distinction between the *Klein* and the *St. Louis Trust Co.* cases

is so narrowly technical and unsound that we will urge, in the alternative, in Point II that the latter cases should be expressly overruled.

I

THE REMAINDER INTEREST IN THE TRUST PROPERTY WAS TO PASS FROM THE SETTLOR AND VEST IN OTHERS ONLY UPON THE CONDITION PRECEDENT THAT HE DIE DURING THE CONTINUANCE OF THE TRUST. ACCORDINGLY THE TRANSFER OF THAT REMAINDER INTEREST WAS INTENDED TO TAKE EFFECT AT OR AFTER THE SETTLOR'S DEATH AND FALLS WITHIN THE RULE OF THE *KLEIN* CASE

In the *Klein* case the grantor conveyed to his wife a life estate in certain lands, but provided that in the event she survived the grantor she was to take the lands in fee simple. The husband died before the wife. The Commissioner ruled that the transfer of the remainder was one intended to take effect in possession or enjoyment at or after the grantor's death. This Court sustained the Commissioner's determination, saying (283 U. S. at 233–234):

> The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore, was contingent. * * * It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger

estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

Helvering v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co., supra,* decided by a bare majority of the Court, did not overrule the *Klein* case, but sought to distinguish it. In the first of these two cases the decedent transferred securities in trust, the income to be paid to his daughter during her life, with remainder over to named beneficiaries. The indenture contained a further provision that if the daughter should predecease the grantor the estate was to be paid over to the grantor. This Court, construing the trust instrument, concluded that the grantor retained nothing save a "mere possibility of a reverter," and had no power to resume ownership, possession, or enjoyment "except upon a contingency in the nature of a condition subsequent" (296 U. S. at 43). The *Klein* case was distinguished on the ground that there the remainder became vested in the grantee only "upon the condition precedent that the grantor die during the life of the grantee" (*idem*, p. 45). In the *Becker* case, the trust instrument provided that the grantor's child should receive a stated income, and that if the child should die before the grantor the estate should "thereupon revert" to the grantor, or if the grantor should die

before the child, then the property should become the child's immediately and absolutely. This Court, emphasizing the provision that the trust estate should "revert" in case of the predecease of the beneficiary, stated that the question was whether the "mere possibility of a reverter" brings the transfer within the reach of the statute (296 U. S. at 50–51). In this view, it was held that the case was ruled by the decision in *Helvering* v. *St. Louis Trust Co.*, decided the same day.

If the distinction upon which the *St. Louis Trust Co.* cases appeared to turn—i. e., between (1) a vested remainder subject to defeasance by a condition *subsequent*, on the one hand, and (2) a contingent remainder subject to a condition *precedent*, on the other—be followed, then we believe that the interests transferred and retained in the present cases are within the latter category and hence within the statute. The grantor's children had only a contingent remainder subject to the condition precedent that he predecease the life tenant, while the grantor retained a vested interest subject to being divested only by his predeceasing the life tenant. He retained far more than a "mere possibility of reverter", and this case is therefore ruled by the *Klein* case rather than by the *St. Louis Trust Co.* cases.

In the leading case of *Doe, Lessee of Poor,* v. *Considine*, 6 Wall. 458, this Court quoted and adopted the following familiar test for distinguish-

ing between vested and contingent remainders (p. 476):

> Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time,* the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainder-man before the determination of the particular estate, his vested estate will be subject to be devested by that event, and the interest of the substituted remainderman which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder.

Under this test it would seem clear that the decedent retained a vested interest in the transferred property which was divested only by his death. The "particular estate" was for the life of his divorced wife. That estate was to "determine" by her death, or remarriage, the first of which events "must unavoidably happen by the efflux of time." Immediately upon the determination of the particular estate possession of the property was in all events to be returned to the decedent,

with the one exception—his own death prior to the determination of the particular estate. Thus, in every respect the test is met. See also *McArthur* v. *Scott*, 113 U. S. 340, 380; *Simpson* v. *Welsh*, 44 Ohio App. 115, 119; *Boye* v. *Boye*, 300 Ill. 508, 511.

The distinction between vested and contingent remainders is similarly spelled out as follows in the well-known definition in Gray, *Rule Against Perpetuities* (3d Ed), § 9:

> A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine. A remainder is contingent if, in order for it to become a present estate, the fulfilment of some condition precedent, other than the determination of the preceding freehold estates, is necessary * * *

Thus, the interest retained by the grantor herein was vested because it was ready to become a present estate upon the termination of the life estate in his wife. Certainly, it was far more substantial than a "mere possibility of reverter".[2] The re-

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[2] We are somewhat at a loss to know precisely what the Court meant when it said that the grantors in the *St. Louis Union Trust Co.* cases had a "mere possibility of reverter". The Court could not have been using that term in its commonly accepted meaning, namely that which remains after a determinable fee, an interest that is neither alienable nor subject to the rule against perpetuities. See Gray, *Rule Against Perpetuities* (3d Ed.) §§ 13, 41; 1 Fearne, *Remainders* (4th Am. Ed.), p. 381, n; *First Universalist Society* v. *Boland*, 155 Mass. 171. Indeed, it has even been suggested

mainder to his children, however, was contingent, because, in order for it to become a present estate, it was necessary that the grantor die during the continuance of the life estate and thus satisfy the condition precedent. See also 1 Fearne, *Remainders* (4th Am. Ed.), p. 217; 2 Washburn, *Real Property* (6th Ed.), § 1532; Challis, *Real Property* (3d Ed.), p. 74; 1 Minor, *Real Property*, §§ 739–740; *Robinson for an Opinion*, 45 R. I. 137; *Sager* v. *Galloway*, 113 Pa. St. 500; *Copenhaver* v. *Pendleton*, 155 Va. 463; Restatement, *Future Interests* (parts 1 and 2), pp. 561–564; Restatement, *Trusts*, § 129, Comment b. It is hence apparent that here, as in the *Klein* case, *supra*, the grantor retained an interest in the property which would, as to the remainder, vest in enjoyment and possession in the named beneficiaries only by virtue of the death of the grantor.

Applying these principles, it has been held in at least several comparable situations that similar transfers were intended to take effect in possession or enjoyment at or after death. *Commissioner* v.

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that after the Statute *Quia Emptores* in 1290, abolishing tenure after a fee, determinable fees and possibilities of reverter could no longer be created. Gray, *op. cit. supra*, § 31. But see Powell, *Determinable Fees*, 23 Col. L. Rev. 207 (1923); Vance, *Rights of Reverter and the Statute Quia Emptores*, 36 Yale L. J. 593. And in any event, it is doubtful that determinable fees and possibilities of reverter could ever be created in personal property.

Schwarz, 74 F. (2d) 712 (C. C. A. 2d); *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st); *Union Trust Co.* v. *United States*, 54 F. (2d) 152 (C. Cls.), certiorari denied, 286 U. S. 547; *Estate of Waldo C. Bryant* v. *Commissioner*, 36 B. T. A. 669, affirmed, 104 F. (2d) 1011 (C. C. A. 2d), certiorari granted, Nov. 6, 1939, No. 339, present Term; see *Hoblitzelle* v. *United States*, 3 F. Supp. 331, 334 (C. Cls.).

The application of these principles to the cases at bar is particularly called for, since the trust served to discharge the grantor's duty of support during the lifetime of his wife or, so long as she did not remarry. Thus even in respect of the life estate the property remained in a substantial sense the grantor's, being applied to the performance of an obligation owed by him. Compare *Douglas* v. *Willcuts*, 296 U. S. 1. When the transfer had served that purpose, the corpus was to be returned to him. It was only in the event that he should not then be living, and consequently have no further opportunity to make disposition of the remainder as part of his estate, that the remainder was to be conveyed to his children or grandchildren.

We submit, therefore, that the present cases are ruled by the *Klein* case, and not by *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.*

II

HELVERING v. ST. LOUIS TRUST CO. AND *BECKER v. ST. LOUIS TRUST CO.* ARE UNSOUND AND SHOULD BE OVERRULED

1. In Point I we contended that the grantor retained a *vested* interest subject to being divested only by his death prior to the termination of the life estate, that he gave his children only a *contingent* remainder, and that the transfer of the remainder was therefore intended to take effect in possession or enjoyment at or after his death within the rule of the *Klein* case.

However, if we should be wrong in thus describing the interests retained by the grantor and those transferred by him, and if they fall within the rule of the *St. Louis Trust Co.* cases, we will then contend that those cases themselves constitute a departure from the sound rule of the *Klein* case, and that they should be reexamined here.

As we understand the difference between the *Klein* and the *St. Louis Trust Co.* cases, it is simply that between a vested remainder subject to being divested and a contingent remainder—a difference primarily in terminology that has no substantial practical consequences in terms either of the quality or of the economic magnitude of the interests created. The lack of any substantiality in that difference may be illustrated by the two following examples:

(1) To A for life, remainder to the grantor, but if the grantor predecease A, then remainder to A, or to others. (*Klein* case.)

(2) To A for life, remainder to A (or to others), but if the grantor outlive A, then remainder to the grantor. (*St. Louis Trust Co.* cases.)

Thus the grantor's interest in (1) is vested subject to being divested, whereas in (2) it is contingent. But that difference is merely one of conveyancing terminology. It is not a difference that has any practical consequences. In both (1) and (2) the economic interests which the grantor retained are identical. Yet taxability has been made to depend upon whether the interest retained by the grantor is couched in terms of a vested remainder subject to being divested, as was the situation in the *Klein* case, or whether the interest retained is couched in terms of a contingent remainder, as was the situation in the *St. Louis Trust Co.* cases.

The draftsman in the *Klein* case could just as easily have phrased the transfer "to my wife in fee, but if she dies before I do, then to me." Under the rule of the *St. Louis Trust Co.* cases, that transfer would not be taxable, although it creates interests that are identical in quality with those actually present in the *Klein* case. It seems impossible to believe that Congress could have intended tax consequences to turn upon the ingenuity of the conveyancer who is free to draft the instrument either way without in the least affecting the

quality of the estates that are being created. And the Court in the *Klein* case itself recognized that taxability should depend upon the reality of the situation rather than upon niceties of the art of conveyancing or the law of contingent and vested remainders. In clear and unambiguous language this Court declared (283 U. S. at 234):

> Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States*, 281 U. S. 497.

We respectfully submit that the *St. Louis Trust Co.* decisions constitute a departure from the rule as announced and applied in the *Klein* case, and we urge that they be reconsidered.

In his dissenting opinion in *Helvering* v. *St. Louis Trust Co.*, concurred in by the Chief Justice, Mr. Justice Brandeis and Mr. Justice Cardozo, Mr. Justice Stone stated (296 U. S. at 47):

> Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in sus-

> pense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form. * * * However we label the device it is but a means by which the gift is rendered incomplete until the donor's death. * * *

We believe that the dissent in that case represents the correct view and is supported in principle by a considerable body of authority.[3]

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[3] The question presented by the *St. Louis Trust Co.* cases was also presented to the Court in *Helvering* v. *Duke*, 290 U. S. 591, where the Chief Justice took no part in the consideration or decision of the case, and where the decree of the lower court was affirmed by an equally divided Court, (Cf. *Hertz* v. *Woodman*, 218 U. S. 205, 213–214.) The composition of the Court remained unchanged in the *St. Louis Trust Co.* cases in which the Chief Justice participated and joined in the dissenting opinion.

While the question was also present in modified form in *McCormick* v. *Burnet*, 283 U. S. 784, we believe that the Court did not pass upon it in that case. The *McCormick* case was argued together with *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, and *Morsman* v. *Burnet*, 283 U. S. 783. All three involved the common question whether the reservation of a life interest by a settlor subjected the transfer to tax. There was a conflict of decisions upon *that point* among the Circuit Courts of Appeals which was presumably the basis for the granting of the writs of certiorari. All three cases were decided together three days after argument in identical *per curiam* opinions upon the sole authority of *May* v. *Heiner*, 281 U. S. 238. *May* v. *Heiner* was relevant to the question of the effect of the reservation of a life estate by the grantor, but it had no relation to the other question that was incidentally present in the *McCormick* case with regard to the grantor's right to regain the prop-

This Court has repeatedly stated that it is the substantial effect of transactions that is important for the purpose of taxation rather than the form in which they are cast. *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Burnet* v. *Harmel,* 287 U. S. 103, 111; *Palmer* v. *Bender,* 287 U. S. 551, 555; *Burnet* v. *Guggenheim,* 288 U. S. 280, 283–284; *Reinecke* v. *Smith,* 289 U. S. 172, 177; *Estate of Sanford* v. *Commissioner,* decided November 6, 1939, No. 34, present Term. And the Court has been particularly alert to apply these principles in the field of death taxes, where it has frequently held taxable a shifting of economic benefits at death regardless of technical property law concepts. *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 335; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Tyler* v. *United States,* 281 U. S. 497, 503; *Klein* v. *United States, supra; Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160; *Gwinn* v. *Commissioner,* 287 U. S. 224, 229; *Porter* v. *Commissioner,* 288 U. S. 436;

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erty upon surviving her children. That the *McCormick* decision cannot be regarded as having ruled upon this issue is further made plain by the fact that the *Klein* case was argued on the same day as the *McCormick, Northern Trust,* and *Morsman* cases, and was decided only a few weeks later. The *Klein* opinion does not mention the *McCormick* case, and we submit that if the Court had considered the *Klein* case as distinguishable from the *McCormick* case only on so fine a point as the form of the limitation, it would have so stated. And the fact that the Court in the *Klein* case did affirmatively state that niceties in the art of conveyancing are unimportant seems conclusive that it had not decided the *McCormick* case on that ground.

Third National Bank & Trust Co. v. *White,* 287 U. S. 577; *Helvering* v. *Bowers,* 303 U. S. 618; *Foster* v. *Commissioner,* 303 U. S. 618; *United States* v. *Jacobs,* 306 U. S. 363, 371; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271.

Helvering v. *St. Louis Trust Co.,* 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.,* 296 U. S. 48, constitute a clear departure from these well settled principles. Those two cases, turning as they do upon the thin distinction between a vested remainder subject to defeasance by a condition subsequent, and a contingent remainder subject to a condition precedent, have lost sight of the controlling question under the taxing statute, which is whether the transfer is intended to take effect "in possession or enjoyment" at or after the grantor's death. Substance has been sacrificed to form, and the operation of the taxing Act has been removed to a field of ambiguities and inconsistencies. It has been said that "Perhaps no question can arise in the course of legal inquiries more doubtful in its nature or less referable to fixed and certain rules and principles, than whether the words of a devise or bequest constitute a vested or contingent remainder." *Shattuck* v. *Stedman,* 2 Pick. 468, 469 (Mass.). And Chancellor Kent, referring to Blackstone's treatment of the distinction between vested and contingent remainders, praised it for its "perspicuity, simplicity, comprehension, compactness, exactness, accuracy and admirable

precision," and added "I have read the chapter frequently, but never without a mixture of delight and despair." See *Shufeldt* v. *Shufeldt,* 130 Wash. 253, 257–258.

The distinction between a contingent remainder and a vested remainder subject to being divested (sometimes referred to as an executory limitation, or conditional limitation, or shifting use) arose centuries ago out of the necessities of the medieval concepts of continuity of seisin and feudal tenure. As a consequence of the metaphysical notion that a "gap in the seisin" was impossible, contingent remainders were destructible, whereas vested remainders were not subject to this infirmity. Cf. *Archer's Case,* 1 Coke [redacted], 66 b. "The English rule as to the 'destructibility of contingent remainders' originated in the fact that, in the sixteenth century, the then already obsolescent doctrines of seisin persisted as to remainders, although they failed to gain recognition as to executory interests. Its basis was historical and not rational * * *" (Restatement, *Future Interests,* Sec. 240, Comment b). But even this distinction never existed in equity (Gray, *Rule Against Perpetuities* (3d Ed.), Sec. 324) and has long since ceased to have any practical consequences at law.

We respectfully submit that when Congress spoke of transfers "intended to take effect in possession or enjoyment" at or after death, it was simply undertaking to tax transfers that were

substitutes for testamentary dispositions, and that it never intended to revivify medieval concepts of property law as a basis for determining taxability. The decisions in the *St. Louis Trust Co.* cases to the contrary stand out in striking contrast to the realistic approach in such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *Porter* v. *Commissioner*, 288 U. S. 436, and the *Klein* case, where the shifting of economic benefits at death was held to be sufficient ground upon which to base the tax.

2. In *Helvering* v. *St. Louis Trust Co., supra,* this Court quoted (pp. 44–45) at some length from and apparently relied upon *Matter of Barstow,* 230 App. Div. (N. Y.) 371, 372–373, affirmed, 256 N. Y. 647. Courts of other states have, however, disagreed with the result reached by the New York court. In *In re Lowengart's Estate,* 160 Ore. 118, the decedent had created a trust with directions to pay the income therefrom to his daughter during her life. The instrument provided that in the event the daughter should die before the settlor the trust should terminate and the trustee should pay over the principal and any accumulation to the settlor. It was then provided that in the event the daughter should survive the settlor the trust should continue for a stated period and upon its termination the principal should be distributed to his grandchildren as therein provided. The court there held that the grandchildren of the decedent acquired a

vested remainder subject only to be defeated by the death of their mother before that of the decedent, but further held (p. 134):

> But, despite the technical vesting of the remainder interest, in a practical sense that interest was subject to an economic burden as long as the donor remained alive. "Taxes are very real things and statutes imposing them are measured by practical results." * * * The terms of the trust instrument were such that the grandchildren could never come into possession and enjoyment of the corpus of the estate until after the death of Ignatz Lowengart [the settlor]. His death made final, certain and absolute, at least so far as the provision for reverter is concerned, what had theretofore been affected by more or less doubt and uncertainty. It removed an obstacle, placed in the trust instruments by the settlor, to the beneficiaries' ultimate enjoyment of their grandfather's bounty, and as a result an economic benefit shifted to them. These things being so, we think the succession was not complete until that event occurred, and that, necessarily, therefore, the gift was intended to take effect in possession and enjoyment after the death of the donor.

Of like import are *Hackett* v. *Bankers Trust Co.*, 122 Conn. 107; *Boston Safe Deposit & Trust Co.* v. *Com'r Corp. & Tax*, 267 Mass. 240. See also *DuBois' Appeal*, 121 Pa. 368; *Wright's Appeal*, 38 Pa. 507.

In the *Lowengart* and *Bankers Trust Co.* cases, *supra,* the taxpayers relied upon this Court's decisions in *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.* The courts attempted to distinguish the cases on the ground that the federal tax is on the transfer while the state tax was on the succession. It is true that there is, as suggested by the courts, a difference in the incidence of a transfer tax and a succession tax. But that difference should not call for diverse results where precisely the same combination of events (the donor's survivorship of or death before an event certain to occur) determines whether he will continue to enjoy, or will have returned to him, property placed in trust by him, or whether that property will go to someone else. If technical theories of property law may be disregarded for purposes of a succession tax, they should likewise give way for purposes of the transfer tax. And whether there has been a shifting of economic benefits at death has been held to be equally determinative in the case of estate taxes (*Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345) as it has in the case of succession taxes (*Saltonstall* v. *Saltonstall,* 276 U. S. 260; but cf. *Coolidge* v. *Long,* 282 U. S. 582). The holding that the death of the donor results in shifting an economic benefit *to* the survivors certainly carries with it the conclusion that the economic benefit has come from some source at the death of the donor. The sum total of economic

benefits was originally in the donor prior to the transfer in trust. To the extent that he has not, in the creation of the trust, transferred those benefits to someone else they are retained by him. In such circumstances, if there is a shifting *to* the survivors, there must likewise be a shifting *from* the decedent.

3. In an effort to conform to the *St. Louis Trust Co.* decisions, the Treasury Department amended its regulations. Article 17, Regulations 80 (1937 Ed.), *infra*, p. 42. Under the amended regulations, turning upon technical and long outworn concepts of medieval property law, the line of demarcation will at times have to be drawn so nicely that the distinction made will seem the merest quibble. It is submitted that the statute does not require such a distinction, and we urge that the Court decide this case upon our Point II rather than Point I, so that the Treasury may be relieved of the necessity of continuing a practice which it feels was forced upon it by the *St. Louis Trust Co.* decisions.

The problem is one which cannot readily be dealt with by amendatory legislation. It would be unsatisfactory, if not almost impossible, to attempt to describe in the statute the numerous limitations of estates by which transfe are made to take effect in possession or enjoyment at or after the death of the grantor. In *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; and *McCormick* v. *Burnet*, 283 U. S.

784, it was held that a transfer with the retention of a life estate in the grantor was not embraced within the statutory language as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.[4] In conjunction with those decisions, the decisions in the *St. Louis Trust Co.* cases deprive the statutory language of virtually any substance. The statute, speaking in terms of possession or enjoyment, carefully avoids the formal niceties involved in definitions of title. And since *Helvering* v. *St. Louis Trust Co.* and *Becker* v. *St. Louis Trust Co.* have adopted a purely formal test for determining the taxability of transfers intended to take effect in possession or enjoyment at or after death—a test that is inconsistent with principles that have long been applied by this Court, and particularly inconsistent with *Klein* v. *United States*—we respectfully submit that those decisions should be overruled.

4. Thus far in Point II, we have contended that there is no substantial difference between vested remainders subject to divestment and contingent remainders, that whichever the grantor retains there is a shifting of economic interest from him at death, and that the *St. Louis Trust Co.* cases which draw a distinction between the two types of interestes are unsound and should be overruled.

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[4] The lacuna left by these decisions was soon filled by amendatory legislation directed at the specific point there involved. See *Helvering* v. *Bullard*, 303 U. S. 297.

But there is, in addition, a far more fundamental reason, wholly apart from the shifting of economic benefits at death, which justifies the imposition of the tax—namely, that the transfer was a substitute for a testamentary disposition, and was literally intended to take effect in possession or enjoyment at or after the grantor's death.

The federal estate tax statute seeks to reach not only property passing at death but also transfers intended as substitutes for testamentary dispositions. Probably the most familiar of the latter is the gift in contemplation of death. It is included in the gross estate, even though it be irrevocable, and even though it may have been completed many years before the grantor's death. Although nothing passes at death, the transfer is taxed as part of the gross estate because it is a *substitute* for testamentary disposition, and as such may properly be classified with property actually passing at death. See *Milliken* v. *United States*, 283 U. S. 15, 20; *United States* v. *Wells*, 283 U. S. 102. Similarly, an ordinary revocable *inter vivos* transfer is included in the gross estate (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339), because the shifting of economic interests is the element which converts an otherwise nontestamentary transfer into one that is a substitute for property passing at death. But the reservation of control and the

shifting of interests at death are not the only considerations that may justify the tax. For, as we have just seen, an irrevocable gift, if made in contemplation of death, is likewise included in the donor's gross estate. The common element is this: Both are testamentary in character, one because of the reserved power, the other by reason of the inherent nature of the gift.[5]

We submit that when Congress spoke of transfers intended to "take effect in possession or enjoyment" at or after the grantor's death, it meant exactly what it said and that it treated such transfers, wholly apart from the shifting of economic benefits, as inherently substitutes for property passing at death. Any additional requirement that there be a shifting of economic interests at death as well ignores the dual character of the estate tax which reaches not only property actually passing at death, but also irrevocable *inter vivos* gifts intended in lieu of testamentary gifts. If there is a shifting of interests at death then that fact alone would establish that the transfer was intended to take effect in possession or enjoyment at or after death. *Reinecke* v. *Northern Trust Co., supra.*

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[5] A similar situation exists in the field of income taxation. In addition to taxing income to the one who receives it, Congress taxes (a) the grantor of a revocable trust (*Corliss* v. *Bowers*, 281 U. S. 376) because of his power to control the income; and (b) it also taxes the grantor of an irrevocable trust, if under appropriate circumstances the trust performs a function for him that might normally be performed by the use of his own income (*Burnet* v. *Wells*, 289 U. S. 670).

But the absence of such a shifting cannot be fatal if the transfer were otherwise intended to take effect, etc.[6]

Congress carefully avoided the use of the word "title," or like terminology. It spoke only of

[6] The shifting of economic interests at death may be important in cases where the original transfer was made before the enactment of the estate tax law and where it is necessary to meet the objection of retroactivity. In that situation, the fact that interests do pass at death after the enactment of the statute removes that objection. Thus, a tax on a completed gift made before the enactment of any federal estate tax law may be invalid where nothing passes at death occurring after the enactment of the statute (cf. *Nichols* v. *Coolidge*, 274 U. S. 531), but where there is a shifting of economic interests at death that objection cannot stand (cf. *Porter* v. *Commissioner*, 288 U. S. 436, 444–445; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345).
However, where the transfer is a substitute for a testamentary gift or may otherwise be classified with testamentary gifts, it is wholly immaterial whether or not there is any shifting of interests at death, provided that the transfer be made after the enactment of the estate tax law. This is strikingly brought out by a comparison between *Helvering* v. *City Bank Co.*, 296 U. S. 85, on the one hand, and *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98, on the other. Nothing passed at death in any one of those three cases; yet the tax was sustained in the *City Bank Co.* case, but invalidated in the other two because of retroactivity.
In the instant case, the transfer was made in 1919, after the enactment of the first federal estate tax law containing the provision relating to transfers intended to take effect in possession or enjoyment at or after death (Sec. 202 (b) of the Reveue Act of 1916, c. 463, 39 Stat. 756), so that the objection based upon retroactivity can have no force here. Cf. *Milliken* v. *United States*, 283 U. S. 15, 22; *Klein* v. *United States*, 283 U. S. 231, 234–235; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160, 166.

"possession or enjoyment." The distinction is plain. "An estate may be either vested *in possession,* or vested only *in interest,* the actual possession being in another. The phrase vested in possession needs no definition. An estate is said, though not vested in possession, to be vested in interest in a given person, when that person would be entitled, by virtue of it, to the actual possession of the lands, if the estate should become the estate in possession by the determination of all the precedent estates." (Challis, *Real Property* (3d Ed.), p. 74.)

Moreover, the provision dealing with transfers intended to effect, etc., appears in the same clause as the provision relating to gifts in contemplation of death. These provisions were meant to reach substitutes for testamentary dispositions. Therefore, if the gift of the remainder here in question can be regarded as having been intended literally to take effect in possession or enjoyment at or after the decedent's death, it was a substitute for a testamentary gift and should be taxed as such whether or not there was a shifting of economic interests at death.

Here, if the decedent had outlived his former wife, the trust property would all have been returned to him. Meanwhile, the income to a stated amount was to be used in discharge of his obligation to her, and the balance of the income to be returned to him. The decedent's children or

grandchildren had no right to use or dispose of the trust property so long as he lived. Until his death they had no assurance that they would ever have actual possession or enjoyment of the property. In every real sense, therefore, the transfer of the remainder to them was intended to take effect in possession or enjoyment at or after the decedent's death. And in every other case where property is transferred in trust either for the life of the grantor himself or for the life of some other person and where the *vesting in possession* of the remainder is contingent upon the death of the grantor, then such transfer not only literally falls within the statute, but is also precisely the kind of transfer at which the statute was directed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that judgments of the court below should be reversed.

Respectfully submitted.

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NOVEMBER 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. [As amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

*   *   *   *   *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

*   *   *   *   *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.)

SEC. 315. [As amended by Section 613 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and sections 803 and 809 of the Revenue Act of 1932.] (a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in

fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 427.)

SEC. 316. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or

donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the decedent or donor.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(U. S. C., Title 26, Sec. 500.)

Prior to its amendment by Section 803 of the Revenue Act of 1932, the first sentence of Section 302 (c) of the Revenue Act of 1926 had been amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, to read as follows: [1]

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

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[1] The portion added by the amendment of March 3, 1931, is italicized.

Treasury Regulations 37 (1919 Ed.):

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. * * * A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to someone other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable.

Provisions substantially the same as the above were contained in Treasury Regulations 37 (1921 Ed.), Article 24; Regulations 63 (1922 Ed.), Article 20; Regulations 68 (1924 Ed.), Article 18; Regulations 70 (1926 Ed.), Article 18; and Regulations 70 (1929 Ed.), Article 18.

Treasury Regulations 80 (1934 Ed.):

ART. 15. *Transfers during life.*—The following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (2) transfers resulting from an arrangement, whether made before or after the enactment of the Revenue Act of 1916, if title was not to pass

from the decedent to the beneficiary unless the latter survived the former, or title, having passed, was to be divested and the property returned to the decedent if the beneficiary predeceased him (see article 17); (3) transfers made after the enactment of the Revenue Act of 1916 in the case possession or enjoyment was retained by the decedent (see article 18 and the exception stated therein); * * *

The value of transferred property includible in the gross estate is the value at the date of decedent's death. If a portion only of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at date of decedent's death, due to such additions or betterments, should not be included.

* * * * *

ART. 17. *Transfers conditioned on survivorship.*—The expression, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer resulting from the execution of a written instrument or the making of an oral arrangement, without an adequate and full consideration in money or money's worth, whereby title was not to pass from the decedent to the beneficiary (or, if title passed it was to be defeated) unless he survived the decedent, and, should he not so survive, the property is to be restored to the decedent or become a part of his estate. The tax applies without regard to the time when the instrument was executed or the oral arrangement was made, whether before or after the enact-

ment of the Revenue Act of 1916. Thus the gift of a life estate with provision made that upon the death of the life tenant the property is to be returned to the decedent, if then living, otherwise to pass to another, the value of the entire property (less the value at the decedent's death of the life estate, if such estate was then outstanding and had not been transferred by the decedent in contemplation of his death) constitutes a part of the gross estate. It is unimportant whether the decedent's interest be denominated a reversion or a possibility of reverter, and whether the interest of the remainderman is contingent or vested subject to be divested. (See article 15.)

ART. 18. *Transfers with possession or enjoyment retained.* — (a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this sub-

division do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Treasury Regulations 80 (1937 Ed.):

ART. 15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see article 16); (2) transfers to the extent that title remained in the decedent at the time of his death and the passing thereof was conditioned upon his death (see article 17); (3) transfers under which the decedent reserved or retained (in whole or in part) the use, possession, rents, or other income or enjoyment of the transferred property, for his life, or for a period not ascertainable without reference to his death, or for a period of such duration as to evidence an intention that it should extend to his death; including also the reservation or retention of the use, possession, rents, or other income, the actual enjoyment of which was to await the termination of a transferred precedent interest or estate (see article 18); * * *

ART. 17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the

beneficial title to the property (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), remained in the decedent at the time of his death and the passing thereof was subject to the condition precedent of his death. If the tax applies, it does so without regard to the time of the transfer, whether before or after the enactment of the Revenue Act of 1916.

On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event. (See article 15.)

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In the Supreme Court of the United States

OCTOBER TERM, 1939.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

MARY Q. HALLOCK and CENTRAL UNITED NATIONAL BANK OF CLEVELAND, Trustees,

Respondents.

No. 110.

GUY T. HELVERING, Commissioner of Internal Revenue,

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vs.

MARY Q. HALLOCK, EXECUTRIX, Estate of Henry Hallock, deceased,

Respondent.

No. 111.

GUY T. HELVERING, Commissioner of Internal Revenue,

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S. H. SQUIRE, Superintendent of Banks of the State of Ohio in Charge of Liquidation of The Union Trust Company, Successor of The First Trust and Savings Company, Trustee, Cleveland, Ohio,

Respondent.

No. 112.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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STATEMENT.

The questions presented and the facts are correctly stated in the petition for writs of certiorari and require

little elaboration. The amount of the deficiency estate tax payable by the Estate of Henry Hallock, if the petitioner's contention that the alimony trust in question should be included in the gross estate under Section 302 (c) of the Revenue Act of 1926 should be ultimately sustained, would be $596.69, exclusive of interest.

Although it is set forth in the petition, for convenient reference that part of the Trust Agreement of September 3, 1919, providing for the disposition of the trust corpus after the death of the life beneficiary, which we believe to be the only material part of the Trust Agreement, is repeated:

> "'C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively, son and daughter of Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

SUMMARY OF ARGUMENT AGAINST ISSUANCE OF THE WRITS.

1. The Circuit Court of Appeals correctly applied the decisions in *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39 and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48.

2. The decisions in the *St. Louis Union Trust Company* cases are sound and do not conflict with the decision of this Court in *Klein v. United States*, 283 U. S. 231.

3. The language of Section 302 (c), as interpreted by the decisions, is amply effective to accomplish its purpose, but if it lacks substance in any respect the remedy lies only in legislative amendment.

ARGUMENT.

I.

In determining whether or not the Hallock Trust Agreement was a transfer intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of Section 302 (c) of the Revenue Act of 1926, there is no valid distinction between the Trust Agreement and the trust instruments involved in *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48. The Circuit Court of Appeals could see none and held that those cases were controlling of the question.

The petitioner attempts, as he did in the Circuit Court of Appeals, to distinguish the Hallock trust. He says that the remainder, which was given to the Hallock children, was not one subject to defeasance by a condition subsequent, but was subject to a condition precedent, namely "that the settlor die during the continuance of the trust."

But the condition is precisely of the same kind as in both of the *St. Louis Union Trust Company* cases. The Trust Agreement in *Helvering v. St. Louis Union Trust Company* provided for the payment of the income to the grantor's daughter for life, with remainder over to named persons, with the added provision that if the daughter should predecease the grantor, the trust should terminate and the trust estate should be paid over to him. The decla-

rations of trust in *Becker v. St. Louis Union Trust Company* each named one of the grantor's children as beneficiary of certain of the income and provided:

> "If the said beneficiary should die before my death, then the trust estate shall thereupon revert to me and become mine immediately and absolutely, or if I should die before her death, then the property shall thereupon become hers immediately and absolutely."

If the Hallock children's remainder was one subject to a condition precedent, then so were the remainders in the *St. Louis Union Trust Company* cases, for manifestly they cannot be differentiated. But in all of the trust instruments under consideration, in the words of the opinion in *Helvering v. St. Louis Union Trust Company,* the grantor "left in himself no power to resume ownership, possession or enjoyment, except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned."

We submit that the petitioner's contention that the court below misapplied the *St. Louis Union Trust Company* decisions has no shadow of plausibility.

II.

Apparently it is more seriously urged as a ground for granting the petition that there is no satisfactory distinction between the *St. Louis Union Trust Company* cases and *Klein v. United States,* 283 U. S. 231, and that the *St. Louis Union Trust Company* cases should be overruled. It is submitted that the distinction between these cases is not merely formal, but is substantial and fundamental and that they are in no respect conflicting.

The *Klein* case was examined in *Helvering v. St. Louis Union Trust Company* and was thus distinguished in the opinion of the Court:

"The case of *Klein v. United States*, 283 U. S. 231, which is strongly relied upon by the Government, does not support its position. There the grantor, 15 months prior to his wife's death, conveyed to his wife by deed a life estate in certain lands. But in the event that she survived the grantor 'and in that case only' she was to take the lands in fee simple. The effect of this deed, we held, was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee. But here the grantor parted with the title and all beneficial interest in the property, retaining no right with respect to it which would pass to anyone as a result of his death. Unlike the *Klein* case, where the death was the generating source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it."

No reversion was retained by the grantor in the *St. Louis Union Trust Company* cases. Instead, a remainder was given to third persons. Nothing remained in the grantor, except a possibility of reverter in case the life beneficiary should predecease him. The property could only revert to him upon the happening of a condition precedent. The remainder of the third parties, on the other hand, was created by the trust instrument and was subject to be divested only by the happening of a condition subsequent. The death of the grantor put an end to the condition subsequent, but transmitted no interest in property or effected no real change in the quality of any interest, as it did in the *Klein* case. In the language of the opinion in *Helvering v. St. Louis Union Trust Company*—"the only death which could have had such effect was that

of the daughter, the grantee; and that event did not take place." Therefore, in the one case the property was transmitted by the death of the grantor; in the other, it could only have been transmitted by the death of the grantee.

The reality and substantiality of the above discussed differences in the future interests appear clearly from the *Restatement of the Law-Property-Future Interests* (Parts 1 and 2). At page 525 a definite distinction is made between a reversion and a possibility of reverter; the one being a reversionary interest not subject to a condition precedent, and the other such an interest which is subject to a condition precedent. At page 541 remainders are divided into four classes: (a) indefeasibly vested; or (b) vested subject to open; or (c) vested subject to complete defeasance, or (d) subject to a condition precedent. The note on terminology on page 542 shows that the first three classes are vested remainders, but that class (d), a remainder subject to a condition precedent, is contingent. And at page 557 it is stated that the complete defeasibility essential to a remainder of the class (c) type can exist because of a possibility of reverter.

Under these definitions and principles, the trust instruments in the *St. Louis Union Trust Company* cases created vested remainders of the class (c) type, which were subject to defeasance, not upon the happening of a condition precedent, but because of a possibility of reverter, a plain condition subsequent so far as the remainders are concerned. The reversionary interest of the grantor, however, did not have even the dignity of a reversion, but was an interest subject to a condition precedent. In the *Klein* case the situation was reversed; the retained interest of the grantor was a true reversion which was not subject to a condition precedent, but to a condition subsequent and was therefore vested; while the wife's re-

mainder was of the class (d) type, because subject to a condition precedent, and therefore contingent.

The question had been before this Court prior to the decisions in the *St. Louis Union Trust Company* cases. In *Helvering v. Duke,* 290 U. S. 591, judgments of the Board of Tax Appeals and the Circuit Court of Appeals in favor of the taxpayer in a similar case were affirmed by an equally divided Court. The question has, therefore, been once re-examined in the *St. Louis Union Trust Company* cases. These cases have been followed by this Court in *Bingham v. United States,* 296 U. S. 211, and in the decisions of the lower Federal Courts and the Board of Tax Appeals.

One of the transfers held to be non taxable by the opinion in *Hassett v. Welch,* 303 U. S. 303, on the ground that the amendment to Section 302 (c) by the Joint Resolution of March 3, 1931, does not operate retroactively, was similar to those in the *St. Louis Union Trust Company* cases, in that the property would have reverted to the grantor if she had survived her son. The Government could have raised in that case the same contentions made in its petition here, but did not do so. Apparently the *St. Louis Union Trust Company* cases were assumed to be controlling.

The line between the *St. Louis Union Trust Company* cases and the *Klein* case is clearly and satisfactorily defined, both as a matter of principle and practical tax administration. If they should now be re-examined and overruled only confusion and uncertainty can result.

III.

The petition complains that various decisions of this Court, including the *St. Louis Union Trust Company* decisions, have deprived the language of Section 302 (c) of virtually any substance and that the problem cannot readily

be dealt with by amendatory legislation. This comes close to saying that when the language of a taxing statute fails to reach the objects which its administrators think it desirable to reach, this Court should help it out. Of course, the rule of interpretation is the reverse.

For some time the Government thought that the clause "intended to take effect in possession or enjoyment at or after his death" should and did reach transfers where the grantor retained a life estate. When this Court held that this was not so,[1] a great deal of substance departed from the statute, but Section 302 (c) was amended without too great difficulty so as to restore it by making such transfers taxable.[2]

The "deprivation of substance" argument could be invoked with equal force in favor of overruling other decisions of this Court limiting the scope of the phrase under consideration. For example, in *Reinecke v. Northern Trust Company*, 278 U. S. 239, the Court refused to construe the statutory language as taxing an inter-vivos transfer taking the form of a life estate in one other than the grantor, with remainder over to another.

The truth is that this Court has consistently construed Section 302 to apply to transfers where the grantor retained in himself some real element of property which passed to others as a result of his death, but has always reached the opposite interpretation where the transfer leaves nothing in the grantor, even though his death may cause some change in the quality of the estates of others.

Under the present express language of Section 302 and the interpretative decisions, in addition to transfers in

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[1] *May v. Heiner*, 281 U. S. 238;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784.

[2] *Joint Resolution of March 3, 1931.*

contemplation of death, so many types of inter-vivos transfers remain subject to the estate tax that it is not true that the statute has lost any real vitality.

The history of the statute has been that whenever it has been construed as not embracing a particular kind of transfer which Congress has thought to be a proper object of taxation, amendments have promptly followed. But since November 11, 1935, when the *St. Louis Union Trust Company* cases were decided, four separate Revenue Acts have been enacted. One of them was designed as a "loophole" closing measure. Another amended Section 302 itself.[1] It would be difficult to find a stronger case of legislative acquiescence or implied approval. It seems clear that Congress has not entertained the same views of the *St. Louis Union Trust Company* decisions as are voiced in the petition.

There could have been no real difficulty in an amendment, had it been considered desirable. The Treasury Department had no trouble in amending the Estate Tax Regulations to conform to the decisions in the *St. Louis Union Trust Company* cases. By the amendment to Regulations 80 (pages 20 and 21 of the petition) the phrase—"a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer where the title remained in the decedent "and the passing thereof was subject to the condition precedent of his death," and does not include a transfer where no title remained in the decedent even though there is a provision "that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

This amendment states very succinctly the real distinction between the *Klein* case and the *St. Louis Union*

[1] Section 805 (a), Revenue Act of 1936.

Trust Company cases. Surely, there can be no difficulty, such as the petition claims, in determining whether the death of the grantor constitutes a condition precedent to the passing of property or merely an event extinguishing a possibility of reverter.

CONCLUSION.

In its essence the petition is asserting that the administrative branch of the Government is finding statutory language, as interpreted by the decisions, to be "unsatisfactory." It is said that the legislative branch, to which the matter obviously belongs, cannot, for reasons somewhat obscure, frame a statute which will be satisfactory. This Court is therefore asked to take over the task. The case at bar, involving less than $600.00, is only the vehicle for the petition to the judicial branch to assume these basically legislative functions.

Even counsel for the Government cannot say more than that the distinction between the *Klein* and *St. Louis Union Trust Company* cases is not a satisfactory one. If cases which have been followed by this Court and which have been relied upon by Bench and Bar for four years are re-examined for reasons such as these, there can be no element of finality to any decision.

Respectfully submitted,

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NATURE OF CASES.

These cases, which for practical purposes may be considered as one, involve the question of the taxability, under Section 302(c) of the Revenue Act of 1926 as amended, of

the remainder interest[1] in an alimony trust created by Henry Hallock on September 3, 1919.

The cases originated by appeals to the Board of Tax Appeals from deficiency estate tax assessments. The Commissioner had levied the assessment not only against Mary Q. Hallock, the Executrix, Case No. 111, but also against the Trustees of an insurance trust as transferees, Case No. 110, and against the trustee of the alimony trust as transferee, Case No. 112 (R. 13, 7, 19).

The basic legal question is fully presented in case No. 111, in which the Executrix is Respondent and no separate discussion of the other two cases is necessary.

The Board of Tax Appeals determined that no tax was due and accordingly set the deficiencies aside (R. 37, 46-47). Upon petition for review the Circuit Court of Appeals affirmed. Petitions for writs of certiorari filed by the Commissioner were granted on October 9, 1939.

OPINIONS IN CASE.

The opinion of the Board of Tax Appeals (R. 37) is reported in 34 B. T. A. 575. The opinion of the Circuit Court of Appeals (R. 70) is reported in 102 F. (2d) 1. Both decisions were unanimous.

QUESTION PRESENTED.

The sole question presented [2] is whether the remainder interest (or some lesser interest) in the alimony trust,

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[1] In the Circuit Court of Appeals the Commissioner abandoned the claim, earlier asserted, that the life interest created by the trust was to be included in the gross estate.

[2] Both before the Board of Tax Appeals and in his brief in the Circuit Court of Appeals the petitioner also claimed that the Executrix was not entitled to deduct certain indebtedness of the decedent in excess of the appraised value of the probated assets of the estate. This assertion is now abandoned.

similar in all essential respects to the trusts involved in *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, should now be held taxable as part of the grantor's gross estate under Section 302(c) merely because of the existence of a possibility of reverter such as existed in those cases.

STATEMENT OF CASE.

The facts, as stipulated and as found by the Board of Tax Appeals (R. 28 *et seq.*, 37 *et seq.*), are as follows:

Henry Hallock died testate on October 10, 1932, a resident of Cleveland, Ohio. His widow, Mary Q. Hallock, was appointed Executrix of his estate by the appropriate probate court.

On September 3, 1919, decedent entered into a separation agreement with his then wife, Anne Lamson Hallock, which provided for the payment to her of $500.00 per month as alimony and for the creation of a trust to produce and secure this sum (Ex. B to Stipulation, R. 33-35). On the same day he created a trust of 884 shares of 7% preferred stock of The Ohio Rubber Company, of which trust the Superintent of Banks of Ohio had become trustee at the grantor's death as successor to the original trustee (Ex. A to Stipulation, R. 30-33). The total preferred dividend called for by the stock amounts to $6,188.00 annually, which would be sufficient to meet the payment of $6,000.00 per year to the wife and leave $188.00 per year for the expenses and compensation of the Trustee (R. 29, 39). The trust agreement provided that the net income of the trust, not exceeding $6,000.00 per annum, should be paid to Anne Lamson Hallock for life and that when she should die the trust should terminate and the fund be delivered to the settlor Henry Hallock if then living, but that if he should not then be living, the fund should be paid and delivered to the children of Henry and Anne Lamson Hallock. The trust was subject

to termination or alteration only by the written consent of the settlor and the life beneficiary. Clause "C" of the trust instrument, making provision as aforestated, is shown below.[1]

Anne Lamson Hallock secured the contemplated divorce in October of 1919 (R. 42). She was sixty-three years old on the date of decedent's death (R. 42), is still living, has not remarried and the trust is still in effect (R. 42, 54).

SUMMARY OF ARGUMENT.

I.

(a) The instant cases are controlled by *Helvering v. St. Louis Union Trust Company*, 296 U. S. 39, and *Becker v. St. Louis Union Trust Company*, 296 U. S. 48, and not by *Klein v. United States*, 283 U. S. 231. The *St. Louis Trust Company* cases are sound. Those cases differentiate, for estate tax purposes, between, on the one hand, property rights possessed or enjoyed by a decedent during life and passing at his death, and, on the other hand, mere possibilities of possession or enjoyment which may never occur and are in no aspect subject to the grantor's control. This

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[1] "C. If and when Anne Lamson Hallock shall die, then and in such event and thereupon the within trust shall terminate and said Trustee shall and will pay Party of the First Part if he then be living any accrued income then remaining in said trust fund and shall and will deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike. If and in the event either said Levitt Hallock or Helen Hallock shall at such time be dead, the share which would have gone to him or her if living, shall go to the children of such deceased child and if there be no such children living, then said entire income and principal shall be paid to that child of Henry Hallock then living."

distinction is well founded in the law and even when applied to the practical subject of federal taxation is in no sense an impractical refinement.

(b) The *St. Louis Trust Company* cases do not conflict with the *Klein* case. Klein kept the reversion vested in himself, and gave his wife only a conditional estate, subject to the condition precedent that he should predecease her. His death accomplished a transfer by immediately vesting the entire property in her, in possession and enjoyment. The transfer was in effect as testamentary as if the grantor had made it by will.

In each *St. Louis Trust Company* case the grantor retained no reversion, but only a contingent reversionary interest—a possibility of reverter over which he had no control—the destruction of which by the death of the grantor did not effect the transfer of property to the remainderman. The remainders were vested subject only to defeasance by the happening of a condition subsequent. The transfers were complete when made and in no aspect were substitutes for testamentary disposition.

It is unsound to say that these are differences only in terminology or that they have no substantial practical consequences or that they mean that taxability is made to turn upon the ingenuity of the conveyancer. In only a limited sense does a grantor have a choice between a form of conveyance which creates a taxable result and one which does not. If he chooses the latter he must create property interests of entirely different character than if he chooses the former and, as a result of such choice, must relinquish the possession of his property and all rights of ownership.

II.

(a) All decisions of this Court and the prior decisions of other courts and the Board of Tax Appeals in cases

where there was a possibility of reverter accord with the decisions in the *St. Louis Trust Company* cases.

(b) To overrule the *St. Louis Trust Company* cases would mean to disapprove the settled doctrines of the other decisions of this Court interpreting Section 302 (c) and the abandonment of the present conception of the statute. Such decisions include *Shukert v. Allen*, 273 U. S. 545; *Reinecke v. Northern Trust Company*, 278 U. S. 339; *May v. Heiner*, 281 U. S. 238; *Burnet v. Northern Trust Company*, 283 U. S. 782; *Morsman v. Burnet*, 283 U. S. 783 and *McCormick v. Burnet*, 283 U. S. 784, in all of which the deaths of the grantors terminated reserved rights or interests of far more consequence than a possibility of reverter.

Petitioner's argument that even if nothing passed from the grantor at his death, the transfer should be regarded as testamentary and hence taxable if death in any manner affects the character or quality of the rights of any beneficiary, is not supported by reason and is contrary to the tests of taxability established by the foregoing and all other decisions of this Court.

(c) The circumstance that the obliteration of a possibility of reverter may effect a limited change in the character or quality of a remainder might well be a factor for consideration if the constitutionality of a statute appropriately worded to tax the transfer were challenged. But in a case of statutory interpretation the taxpayer is entitled to have the meaning of the statute determined with regard to the legal nature of the interests created and the mere fact that the death of the grantor may cause some technical or unsubstantial change in the nature of the remainder does not warrant the holding of the transfer to be testamentary within the intendment of Section 302 (c). This proposition finds implied support in all constitutional cases decided by

this Court in which the statutory phrase was involved, when considered in connection with the cases which merely interpret the statute.

III.

A possibility of reverter is not such a property interest that its obliteration by the death of the grantor effects that transfer of property or of economic benefits which is the subject of the estate tax. The termination of a possibility of reverter by the death of the grantor differs from the similar termination of a power of revocation or to designate beneficiaries. A possibility of reverter is entirely beyond the control of the grantor and is not an incident of ownership in the property. It is but an expectancy, the extinguishment of which transfers no interest in property to any one.

IV.

The Congressional and administrative action since the *St. Louis Trust Company* decisions demonstrates that Congress does not desire that transfers subject to possibilities of reverter be taxed as testamentary. *White v. Poor*, 296 U. S. 98, which was decided on the same day as the *St. Louis Trust Company* cases held that the transfer there involved was not taxable under Section 302 (d) of the Revenue Act of 1926. By the Revenue Act of 1936 Congress immediately changed this result by prospectively amending Section 302 (d). This alone shows acquiescence by Congress in the interpretation of Section 302 (c) by the *St. Louis Trust Company* decisions. Furthermore, Section 302 (c) was not amended by the Revenue Acts of 1937, 1938 and 1939, although the 1937 act was passed for the expressed purpose of preventing tax avoidance.

Whenever Congress has disagreed with the result of decisions interpreting Section 302 (c), amendments have promptly followed, as illustrated by the almost instant amendment of the section to avoid the result of cases holding the section inapplicable to irrevocable transfers where the grantor had retained a life interest in the income.

In 1937, Article 17 of Treasury Regulations 80 was amended to conform to the *St. Louis Trust Company* decisions. On February 10, 1939, while the amended regulation was in effect, all of the internal revenue laws were codified and Section 302 (c) was reenacted as Section 811 (c). Thus it is to be presumed that the construction is satisfactory to Congress and that the reenactment of the statute carries such construction with it. The disapproval of the *St. Louis Trust Company* cases would therefore be contrary to the actual intention which must now be ascribed to Congress.

Transfers like those in the *St. Louis Trust Company* cases, where a grantor parts with all control over his property, ought to be subject to the gift tax. The gift tax law, however, does not contemplate two taxes upon gifts not made in contemplation of death. *Sanford v. Commissioner*, Docket No. 34 at this term.

V.

Assuming that the doctrine of *St. Louis Trust Company* cases should no longer be approved by the Court, the doctrine of *stare decisis* as developed by this Court strongly indicates that those cases should not be overruled. The problem calls for the exercise of judicial discretion and many factors should be taken into account.

Granting the desirability of a flexible approach unfettered by earlier determinations where constitutional

questions are involved, nevertheless a more rigid application of the doctrine of *stare decisis* is called for in cases of statutory interpretation. In the latter situation Congress may correct any result regarded by it as disadvantageous. Petitioner's argument that the allegedly wrong result of the *St. Louis Trust Company* cases cannot be met by Congressional action is without merit. Congress could, if it desired, accomplish taxability in many ways.

Another factor is the widespread reliance upon the principles heretofore laid down by this Court. Not only have business affairs been conducted in the light of those principles, but this Court's decisions have been followed extensively by inferior courts and by the Board of Tax Appeals.

Other cogent factors arguing in favor of a rigid application of *stare decisis* are the Congressional action and inaction following those decisions considered in the light of a known Congressional willingness to amend when it believes a decision by this Court to result disadvantageously to the public revenues; and the codification of the revenue laws following the amendment to the Commissioner's regulations. See Section IV immediately *ante*.

Similarly, in considering whether to exercise its discretion in favor of an adherence to the *St. Louis Trust Company* cases the Court is entitled to take into account the rule that substantial doubts are to be resolved in favor of the taxpayer. This rule is frequently applied where there has been no authoritative decision by this Court and should all the more be applied where this Court has spoken and is being urged to change its view rather than await Congressional action.

ARGUMENT.

I.

THESE CASES ARE GOVERNED BY HELVERING v. ST. LOUIS UNION TRUST COMPANY AND BECKER v. ST. LOUIS UNION TRUST COMPANY. THOSE DECISIONS ARE SOUND AND DO NOT CONFLICT WITH KLEIN v. UNITED STATES.

Petitioner contends in his brief, as he did in the Circuit Court of Appeals, that the Hallock Trust is distinguishable from those in the *St. Louis Trust Company* cases and that the case at bar is controlled by *Klein v. United States*, 283 U. S. 231. In the second part of his brief he urges that in any event the *St. Louis Trust Company* cases conflict with the *Klein* case and should be overruled. It is our contention that not only is there no valid distinction between the Hallock Trust and the *St. Louis Trust Company* cases, but that the decisions in those cases are sound and do not conflict with the *Klein* case.

(a) It is submitted that the *St. Louis Trust Company* cases are eminently sound in principle and, as will hereafter be shown, are in accord with and required by the earlier fundamental determinations of this Court.

In effect the *St. Louis Trust Company* cases decide that the statute was intended to levy a tax on true property rights possessed or enjoyed by decedent during life and passing to others at his death, but that it does not tax mere possibilities which are not accompanied with a present right of possession or enjoyment and which are in no aspect subject to the grantor's control. The distinction between true property interests and mere possibilities is real and is in no sense an impractical refinement.

In *Helvering v. St. Louis Union Trust Company* decedent had created a trust the net income of which was to be paid to his daughter during her life, with remainder over to named persons. The trustee was given discretionary

power to terminate the trust, upon the exercise of which the estate was to revert to the grantor. The indenture further provided that if grantor's daughter should predecease him the trust should terminate and the trust estate be delivered to the grantor to be his absolutely. In its essence the latter provision is identical with the Hallock trust. In that trust Mrs. Hallock, about to secure a divorce, was the life tenant, with remainder over to her children. Similarly, if the life tenant, Mrs. Hallock, should predecease Mr. Hallock the trust was to terminate and the trust estate was to become Mr. Hallock's absolutely. The parallel in legal principle is clear.

Except for the fact that there were no remainders to third persons, the trust involved in *Becker v. St. Louis Union Trust Company* is not only identical in legal effect with the Hallock Trust, but strikingly similar in phraseology. In that case the grantor declared that he held certain property in trust for a named person. The trust agreements then provided (296 U. S. p. 50):

> "(a) If said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

The principal basis of the distinction attempted is the claim that the remainders of the Hallock children are contingent remainders which would vest only upon the happening of a condition precedent and therefore the grantor retained a vested reversion, subject to being divested by the happening of a condition subsequent. Granting these premises, the distinction would be established, for it is true that in the *St. Louis Trust Company* cases the grantor "left in himself no power to resume ownership, possession

or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned." (*Helvering v. St. Louis Union Trust Company* at p. 43 of 296 U. S.) It is only necessary, however, to set the language of Clause "C" of the Hallock Trust opposite the above quoted provisions from the trust agreement in *Becker v. St. Louis Union Trust Company* to see that there is no distinction either in substance or in form.

(b) Although part of petitioner's brief purports to be directed to the proposition that the *St. Louis Trust Company* cases and the instant case are distinguishable, his principal argument is that those cases are in conflict with *Klein v. United States*, 283 U. S. 231. It is submitted that the distinction between the cases is fundamental.

The *Klein* case was examined in *Helvering v. St. Louis Union Trust Company* and was thus distinguished in the opinion of the Court, at page 45 of 296 U. S.:

> "The case of *Klein v. United States*, 283 U. S. 231, which is strongly relied upon by the Government, does not support its position. There the grantor, 15 months prior to his wife's death, conveyed to his wife by deed a life estate in certain lands. But in the event that she survived the grantor 'and in that case only' she was to take the lands in fee simple. The effect of this deed, we held, was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee. But here the grantor parted with the title and all beneficial interest in the property, retaining no right with respect to it which would pass to anyone as a result of his death. Unlike the *Klein* case, where the death was the generating

source of the title, here, as the court below said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it."

The Government's argument is that despite the distinction so made by this Court, the trusts in the *St. Louis Trust Company* cases were, as was the conveyance in the *Klein* case, substitutes for testamentary disposition within the intendment of the statute.

The difference between the *Klein* and the *St. Louis Trust Company* cases is obvious and can readily be seen without resort to fine distinctions of real property law with reference to the nature of the estates created. But if it is necessary to consider this difference legalistically, it is submitted that from this approach also it is fundamental.

The most simple and practical distinction is whether the grantor, as in the *Klein* case, retained until his death the ownership, or a substantial incident of ownership, of his property, which passed to another as a result of his death or whether, as in the *St. Louis Trust Company* cases, he completely divested himself of control, possession or enjoyment, reserving the mere, and at times remote, possibility of resuming those incidents of ownership upon the happening of some event over which he had no legal or practical control, which possibility passed to no one as a result of his death.

Klein was completely unwilling to give up the possession, control or enjoyment of his property. After the grant of the life estate, his deed merely said in effect—"if my wife shall survive me, I give her my property in fee simple." The advantages of the fee simple title so retained remained in Klein as well as the burdens which accompany those advantages. His deed gave to his wife nothing but a fee simple estate upon a condition and

effectively postponed the date of the passing of his property to her until his death by keeping the reversion vested in himself and providing that it should pass to his wife, not presently, but if she should survive him "*and in that case only.*" His death did far more than to effect a mere technical change in the nature of his wife's contingent remainder. It caused the immediate vesting of the entire property in her in present possession and enjoyment. It was, in effect, more than a *substitute* for testamentary disposition; it was virtually as much of a testamentary disposition as if he had given his reversion to his wife by will.

If the problem is dealt with by considering the legal nature of the estates or interests created, the answer is the same. By his deed Klein retained a vested reversion in his property and gave to his wife at most a contingent remainder, which vested not only in interest but also in possession at his death. In the Hallock trust and those involved in the *St. Louis Trust Company* cases the grantors had no reversion, but only an interest of far less legal and actual consequence—a possibility of reverter; while the interests of the remaindermen which were created by the trust instruments were vested subject to divestiture by the happening of a condition subsequent. The death of the grantor made the remainders indefeasible by putting an end to the condition subsequent, but did not transmute a conditional estate into one vested in possession as it did in the *Klein* case. Neither the possibility of reverter nor any real incident of ownership of property passed to anyone. See Mr. Justice Roberts' dissenting opinion in *Coolidge v. Long*, 282 U. S. 582 at p. 629, referring to *Reinecke v. Northern Trust Company*, 278 U. S. 339:

"Repeatedly throughout the opinion the passage of the control, possession and enjoyment of the property is referred to as the touchstone of the incidence of the tax."

The Government contends that the interest retained by Mr. Hallock was far more substantial than "a mere possibility of reverter." If this be true as to the Hallock trust, so is it as to those of which the St. Louis Union Trust Company was trustee. A question is raised in the Government's brief as to what the Court meant by the term "possibility of reverter" in the *St. Louis Trust Company* cases. It does not appear that this doubt existed in either the majority or the dissenting opinions in those cases. The term is defined in the *Restatement of the Law of Property—Future Interests* (Parts 1 and 2) at page 525, as—"any reversionary interest which is subject to a condition precedent," and it is clear from the *Restatement* that it may be an interest in either real or personal property. See also Section 157 of the *Restatement of the Law of Property*, particularly pages 541, 542, 557 and 558, where are stated principles of the classification of remainders, from which it appears clearly that the remainders in the instant case and the *St. Louis Trust Company* cases were vested subject to defeasance upon the happening of a condition subsequent.

It is claimed that the difference between the *Klein* and *St. Louis Trust Company* cases is only the difference between a vested remainder subject to being divested and a contingent remainder and that this is a difference primarily in terminology which has no substantial practical consequences. As a corollary it is stated that Congress could not have intended tax consequences to turn upon the ingenuity of the conveyancer who is free to draft an instrument either way without affecting the quality of the estates being created.

The truth of this as to Congressional intent may be conceded, as may also the general proposition that "in determining whether a taxable transfer becomes complete only at death we look to substance, not to form." (See dissenting opinion in *Helvering v. St. Louis Union Trust Company*, p. 47 of 296 U. S.) It is also true that the question of the nature of estates created by a conveyance, whether they are vested or contingent, may sometimes turn upon the form or order of language employed.[1]

But it does not follow that the question whether the transfer is taxable can ever, in any proper sense, be said to depend upon the conveyancer's choice of language. The ultimate test is whether the conveyance operates as a transfer intended to take effect at death or is a substitute for testamentary disposition. Whether it so operates may, at times, turn upon whether the remainders it creates are vested or contingent. And, of course, there is a choice in the use of a form of language which in one case will create a vested remainder and in the other a contingent one. But if the grantor directs the draftsman to exercise his choice in such a way as to create estates of a character which make the transfer non-taxable, the grantor must pay for it in some other way, for example, by giving up any substantial rights in his property.

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[1] *Gray on the Rule against Perpetuities*, at Section 108: "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A. for life, remainder to his children, but if any child dies in the lifetime of A. his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent."

This may be illustrated by the example on page 19 of the Government's brief. It is there suggested that in the *Klein* case the conveyance might just as easily have been phrased—"to my wife in fee, but if she dies before I do, then to me." So it might, but it is submitted that the further statement that such a change would create interests that are identical in quality with those actually present in the *Klein* case is incorrect. For under the supposed form of conveyance the grantor parts with the real incidents of ownership of his property. All advantages of ownership, such as the right to rents, the right of action for waste or the right to proceeds of condemnation, would be in the grantee, while if the conveyance takes the general form of the language which was actually used in the *Klein* case, these important incidents of ownership, as well as many others, are retained by the grantor and they pass to the grantee upon his death.[1]

In a case of statutory interpretation it is not to be presumed that Congress did not intend its language to be construed with the aid of established principles of law governing the nature or quality of future interests. Even if these principles may be called technical, they are not merely formal. Only by referring to them may substantial ultimate questions be determined. Moreover, the reality of the distinction between contingent and vested interests is not destroyed by alluding to it as archaic or by pointing to its feudal origin. Many important substantive legal principles are rooted in the past but now have a content applicable to present day conditions.

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[1] See *Tiffany on Real Property*, 2nd Ed., Vol. I, Sec. 93, p. 336; *Thompson on Real Property*, Vol. III, Sec. 2112, p. 176.

II.

THE DOCTRINE THAT TRANSFERS LIKE THOSE IN THE ST. LOUIS TRUST COMPANY CASES ARE NOT TESTAMENTARY AS A MATTER OF STATUTORY INTERPRETATION ACCORDS WITH THE PRINCIPLES SETTLED BY ALL OTHER DECISIONS OF THIS COURT.

(a) All decisions of this Court and the prior decisions of other courts and the Board of Tax Appeals in cases where there was a possibility of reverter accord with the decisions in the St. Louis Trust Company cases.

The first similar case to reach this Court was *McCormick v. Burnet*, 283 U. S. 784. In that case, in addition to a retained life interest in the income, there was a possibility of reverter of the principal to the grantor in case she should survive the other beneficiaries. The Board of Tax Appeals held the trust not subject to the estate tax.[1] While the case was pending in the Circuit Court of Appeals, *May v. Heiner*, 281 U. S. 238, was decided. The Circuit Court of Appeals regarded the case as controlled by *May v. Heiner* so far as the grantor's life estate was concerned, but nevertheless reversed the decision of the Board in a rather vague opinion holding that the existence of the possibility of reverter was one factor showing that the transfer was intended to take effect in possession or enjoyment at or after the grantor's death.[2]

According to the record, *McCormick v. Burnet* was advanced on the docket of this Court for argument after the *Klein* case, upon motion by the Government, which stated that both cases involved a related question. The decision

[1] 13 B. T. A. 423.

[2] 43 Fed. (2) 277.

of the Circuit Court of Appeals was reversed *per curiam* on the authority of *May v. Heiner.* Although nothing was said in the opinion about the question now under consideration, it seems clear that it must have been considered and that the *Klein* case was regarded as inapplicable. Petitioner's brief, pages 21 and 22, argues that the effect of the possibility of reverter in the *McCormick* case was not passed upon. Although petitioner states that the *McCormick* case was argued upon the same day as the *Klein* case, he does not comment upon the important fact that this came about at the Government's instance and through its representation that it involved questions akin to those involved in the *Klein* case. This fact, plus the fact that the lower court's opinion turned upon the effect of the possibility of reverter shows clearly that the issue was before the Court and clearly presented to it and must, therefore, be taken to have been decided. As is pointed out in *Bingham v. United States,* 296 U. S. 211, matters pertinent to an issue before the Court, shown by the record and which were clearly presented to the Court, are to be taken as covered by the decision though not mentioned in the opinion.

Although the question might have been regarded as decided by the *McCormick* case, it soon arose again in *Helvering v. Duke,* 290 U. S. 591, in which the decisions of the Board of Tax Appeals and the Circuit Court of Appeals holding the transfer not taxable under Section 302 (c) were affirmed by an equally divided court.

About a month after the *St. Louis Trust Company* decisions they were followed in *Bingham v. United States,* 296 U. S. 211, and *Industrial Trust Co. v. United States,* 296 U. S. 220, which held that insurance policies taken out by decedents on their own lives prior to the passage of the estate tax law and irrevocably payable to the beneficiaries,

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directly or by assignment, were not subject to the estate tax, despite provisions that if the beneficiaries did not survive the decedents, the proceeds would go to the estates of the decedents. The opinion of the Court in *Bingham v. United States*, said that the *St. Louis Trust Company* cases had established the principle that the title and possession of the beneficiaries were fixed by the terms of the policies and assignments, beyond the power of the insured to affect; that no interest passed to the beneficiaries as the result of the death of the insured, which death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

One of the transfers held non-taxable in *Hassett v. Welch*, 303 U. S. 303, on the ground that the amendment to Section 302(c) by the Joint Resolution of March 3, 1931, does not operate retroactively, provided that the property would revert to the grantor should she survive her son. Apparently the Government did not see fit to raise the contentions made in the case at bar and it seems that the *St. Louis Trust Company* cases were tacitly assumed to be controlling. Had the Court been of the opinion that the possibility of reverter rendered the transfer taxable as one to take effect in possession or enjoyment at death, i.e, that the *St. Louis Trust Company* cases were incorrectly decided, the decision would have been favorable to the Government despite the Court's holding that the joint resolution could not operate retroactively.

Prior to the *St. Louis Trust Company* decisions the question whether the retention of a possibility of reverter makes an *inter vivos* transfer, otherwise absolute, one intended to take effect at or after the death of the grantor, had been before the Board of Tax Appeals and the Federal Courts frequently and substantially all of these decisions

were in favor of the taxpayer.[1] (For decisions of the Federal Courts and the Board following the *St. Louis Trust Company* cases, see pp. 46 and 47, *infra.*).

Petitioner's brief, at pages 25 and 26, cites certain state court decisions, particularly *In Re Lowengart's Estate*, 160 Ore. 118. Even were the case at bar one of first impression, the cited cases could not be regarded as persuasive, because of the difference between a transfer tax and a succession tax, alluded to by petitioner. That this difference was regarded by the court in the *Lowengart* case as creating a controlling distinction from the *St. Louis Trust Company* cases is shown by the following language from the opinion:

> "Notwithstanding some language in the opinion in the *Helvering* case from which a different implication might be drawn, we think that the attempt to attach controlling significance to that decision here rests upon the failure to give due weight to the distinction between a tax on the transfer, such as the federal estate tax, and a tax on the succession, such as the Oregon inheritance tax." (Citing *Reinecke v. Northern Trust Company* and dissenting opinion in *Coolidge v. Long, supra.*)

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[1] *McCormick v. Commissioner*, 13 B. T. A. 423; (reversed 43 F. (2d) 277; Circuit Court of Appeals reversed 283 U. S. 784);
Duke v. Commissioner, 23 B. T. A. 1104 (affirmed 62 F. (2d) 1057 and by equally divided court, 290 U. S. 591);
Peabody v. Commissioner, 24 B. T. A. 787;
Taylor v. Commissioner, 27 B. T. A. 220;
Wallace v. Commissioner, 27 B. T. A. 902 (affirmed without opinion, 71 F. (2d) 1002; certiorari denied, 293 U. S. 600);
Bonney v. Commissioner, 29 B. T. A. 45;
Nichols v. Bradley, 27 F. (2d) 47;
Tait v. Safe Deposit & Trust Co., 74 F. (2d) 851;
Amoskeag Trust Co. v. Field, 10 Fed. Sup. 635;
Wheeler v. Commissioner, 20 B. T. A. 695;
Dunham v. Commissioner, 26 B. T. A. 286.

When a state court, however, holds a transfer subject to a possibility of reverter not to be one intended to take effect at death under a succession tax law, this very difference between a transfer tax and a succession tax lends great strength to such a decision. It was so held in *Matter of Barstow*, 230 App. Div. (N. Y.) 371; 244 N. Y. S. 588; affirmed 256 N. Y. 647. This case is particularly noticed in the opinion of the court in *Helvering v. St. Louis Union Trust Company*, and no further comment is made upon it, except to quote the following from the opinion:

> "As stated by Chief Justice Cardozo in the *Schmidlapp* case, *supra*: 'In *Matter of Craig* (97 App. Div. 289, 89 N. Y. S. 971, affirmed 181 N. Y. 551, 74 N. E. 1116) the remainder was contingent, but the contingency was not dependent on the will of the donor, and the right as against him was already perfect and complete.' "

(b) The basic principles of the other decisions of this Court interpreting Section 302(c) support the St. Louis Trust Company decisions, and the overruling of the latter would mean the disapproval of the settled doctrines of those other decisions.

All of the other decisions of this Court which interpret the statutory phrase "intended to take effect in possession or enjoyment at or after his death," support the principle of the *St. Louis Trust Company* cases, some of them, we submit, to such an extent that if those cases were overruled, this would virtually amount to the disapproval of the accepted and well-founded doctrines of these other cases, and the complete overturn of present conceptions of the statute.

In general these cases all rest upon the concept that what is taxed by the estate tax law is the transmission of or power to transmit property from the dead to the living;

that death is the generating source from which the taxing power takes its being, and that in order to sustain the tax the death must have brought about the completion of the shifting of the economic benefits of property which is the real subject of the tax. *Heiner v. Donnan*, 285 U. S. 312; *Chase National Bank v. United States*, 278 U. S. 327; *Knowlton v. Moore*, 178 U. S. 41.

The earliest case involving solely the interpretation of the words "intended to take effect in possession or enjoyment at or after his death" is *Shukert v. Allen*, 273 U. S. 545, in which the effect of Section 402 (c) of the Revenue Act of 1918 was under consideration. It was there held that a conveyance of securities made before the decedent's death in trust to accumulate the income until a distant date specified and then to divide the fund among his children, vested the interests of the children when executed and did not fall within the statutory language. The Court said that the transfer was immediate and out and out, leaving no interest remaining in the grantor, and that the interests of the children were vested as soon as the instrument was executed, even though those interests might have been divested as to any one of them in favor of his issue, if any, or of the surviving beneficiaries, if he died before the termination of the trust.

The effect of the statutory language next came before the Court in *Reinecke v. Northern Trust Company*, 278 U. S. 339. Two of the seven trusts in that case were revocable by the settlor alone and were held subject to the estate tax upon the grounds set forth in *Chase National Bank v. United States*, 278 U. S. 327, decided on the same date. In the other five trusts there was no power of revocation in the settlor acting alone, but life interests in the income were created in beneficiaries other than the settlor, terminable, as to one trust, five years after the settlor's death or upon the death of the designated beneficiary, should

she survive that date, and as to the other four trusts, five years after the settlor's death or on the death of the respective life tenants, whichever should first happen. In all five trusts there were remainders over upon the deaths of the life beneficiaries. The opinion of the Court, after citing *Shukert v. Allen, supra,* goes on to say, at page 347:

> "There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstances that the possession or enjoyment passed as indicated.
>
> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A. v. Davis,* 264 U. S. 47, 50; *Edwards v. Slocum,* 264 U. S. 61, 62; *N. Y. Trust Co. v. Eisner,* 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

Clearly the time when the remaindermen in that case would come into actual possession or enjoyment of the trust properties was directly dependent upon the death of

the grantor and in that sense the transfer of the remainders might have been said to be testamentary or intended to take effect in possession or enjoyment at or after death. But the remainders were vested by the trust instruments and nothing passed from the possession, enjoyment or control of the settlor at his death. The case, therefore, very importantly limits the scope of the statute.

The next interpretative decision is *May v. Heiner,* 281 U. S. 238. There the decedent had made a transfer in trust, under which the income was payable to her husband during his lifetime and after his death to the decedent during her lifetime, with remainder over to her children. Reversing the lower courts, the Court held that the trust was not subject to the estate tax as a transfer intended to take effect in possession or enjoyment at or after death. The Court said at page 243:

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

The Court went on to quote from that part of the opinion in *Reinecke v. Northern Trust Company, supra,* which indicates that the statute only reaches trusts or interests passing from the possession, enjoyment or control of the donor at his death and that any doubts about the matter must be resolved in favor of the taxpayer.

It was argued for the Government in *May v. Heiner* that the decedent's death terminated her life estate and that the termination of this right to receive the trust income for life if she should survive her husband, which freed the re-

mainder of the possibility of its exercise, was a transfer within the meaning of the statute. No real difference with respect to the question being discussed can be seen between the right or interest retained by the grantor in *May v. Heiner* and the possibilities of reverter in the *St. Louis Trust Company* cases. In the former case the grantor's death obliterated her life estate; in the latter two cases the deaths of the grantors obliterated their contingent reversionary interests—the possibilities of reverter.

Although *May v. Heiner* was but a logical application of the principles of *Shukert v. Allen* and *Reinecke v. Northern Trust Company,* its full implications were not everywhere perceived until the decisions in *Burnet v. Northern Trust Company,* 283 U. S. 782;[1] *Morsman v. Burnet,* 283 U. S. 783;[2] and *McCormick v. Burnet,* 283 U. S. 784.[3]

These cases all involved trusts where the decedent grantors had retained life income interests or estates, with remainders over. By *per curiam* decisions the trusts were all held not to be subject to the estate tax upon the authority of *May v. Heiner, supra.*

In each of these three cases the death of the grantor had far greater practical consequences than the obliteration of mere contingent interests or possibilities of reverter; death terminated the grantor's life estate, which was vested in possession and enjoyment. Viewing the right to the income from property as equivalent to the possession of the property itself, each grantor enjoyed his property until his death and that event transferred the enjoyment of it to others.

At page 30 of his brief petitioner states that, wholly apart from the shifting of economic benefits at death, the remainder in the Hallock trust is taxable because it was a

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[1] Reported below, 41 F. (2d) 732.
[2] Reported below, 44 F. (2d) 902.
[3] Reported below, 43 F. (2d) 277.

substitute for a testamentary disposition and was "literally" intended to take effect in possession or enjoyment at or after death. The argument seems to be that although nothing passes at the grantor's death, nevertheless if that death in any manner affects the coming into possession or enjoyment of the property, it is taxable. Stated another way, it is that no matter how complete the transfer when made and even though nothing passes from the grantor at his death, if that death marks the time at which possession or enjoyment of some part of the transfer commences or in any other manner affects the character, quality or existence of a beneficiary's rights, the transfer is taxable. This must be based upon the broad premise that since testamentary dispositions speak as of the date of death, anything which a grantor does which affects rights at or after his death is necessarily a substitute for a testamentary disposition.

To support this novel view, the Court's attention is called to the fact that Congress has included in the gross estate gifts in contemplation of death (petitioner's brief, p. 30) and has taxed income to a grantor who has nothing more than the power to control that income (petitioner's brief, p. 31). But the fact that Congress may constitutionally prevent avoidance of taxes by making a gift in contemplation of death the legal equivalent of a testamentary disposition and by making control over income in certain circumstances the equivalent of the receipt of the income does not warrant the conclusion that where Congress is not attempting so to do but is merely taxing a defined type of transfer, i.e. one to take effect at or after death, the statute by which this is done must be interpreted to include transfers in which there is no shifting of economic benefits at death.

In the case of gifts in contemplation of death, we are dealing with substitutes for property passing at death. In

the case of gifts to take effect at or after death under Section 302(c), we are dealing not with substitutes for property passing at death but with property actually passing at death.

All of the cases last above discussed beginning with *Shukert v. Allen*, 273 U. S. 545, and ending with the *St. Louis Trust Company* cases depend basically upon the transfer of property, i.e. the shifting of economic benefits at death. That this Court's approach to estate tax problems based upon the necessity of the passage of economic benefits (save where Congress has constitutionally made something the equivalent thereof) is not to be criticized, is fairly inferable from Mr. Justice Stone's discussion in *Sanford v. Commissioner*, case No. 34, October, 1939 Term, decided November 6, 1939, where it is said:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 of the Revenue Act of 1924, 43 Stat. 253, reenacted as Section 501 of the 1932 Act, 47 Stat. 169, imposed a graduated tax upon gifts. It supplemented that on transfers at death, which had long been a feature of the revenue laws. When the Gift Tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title."

Similarly in *United States v. Jacobs*, 306 U. S. 363, in discussing the inclusion of the entire value of property held under joint tenancy in Illinois where upon death of one joint tenant the other succeeds, Mr. Justice Black said, at page 368:

> "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

(c) Where the interpretation and not the constitutionality of the statute is involved, the death of the grantor may effect some change in the quality of the remainder interests without resulting in a testamentary transfer within the scope of the statute.

It is true that the obliteration by death of a possibility of reverter of the type under discussion may effect some technical or limited change in the quality of a remainder interest. In the Hallock trust, for example, the termination of the possibility had the effect of converting the remainders of the Hallock children, which prior to their father's death were vested subject to defeasance, into indefeasibly vested remainders.

It is equally true that, broadly speaking, "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed." *Corliss v. Bowers*, 281 U. S. 376, 378.

But, in *Burnet v. Wells*, 289 U. S. 670, after referring to the above quotation from *Corliss v. Bowers*, it is said at page 678 of the opinion by Mr. Justice Cardozo:

> "Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power."

The principle thus expressed is cogent in the instant case. If Section 302 (c) were amended so as expressly to tax transfers with possibilities of reverter and the constitutionality of the amendment were under attack, then the legal or equitable nature of the reversionary interests or remainders would be subordinated to the question of whether the act is so arbitrary or capricious as to amount

to confiscation. And in determining the presence or absence of these attributes the inquiry would be directed to whether the amendment has any relation to the prevention of tax avoidance and whether the death of the grantor brought into being or ripened for a survivor property rights of such character as to make appropriate the imposition of a tax upon that result. *Tyler v. United States*, 281 U. S. 497.

But where the question is merely one of interpreting language which Congress has selected and could have made as broad or as narrow as it might have desired, it is quite proper that a greater effect be given to the legal meaning of the Congressional words. The doctrine of *Corliss v. Bowers, supra,* has found its greatest expression in constitutional cases.

The proposition now under discussion is, we submit, implicit in cases decided by this Court in which the constitutionality of State or Federal laws taxing various kinds of transfers was under consideration. See *Nichols v. Coolidge*, 274 U. S. 531; *Coolidge v. Long*, 282 U. S. 582; *Saltonstall v. Saltonstall*, 276 U. S. 260; *Chase National Bank v. United States*, 278 U. S. 327; *Tyler v. United States*, 281 U. S. 497; *Porter v. Commissioner*, 288 U. S. 436; *Helvering v. Bullard*, 303 U. S. 297; *United States v. Jacobs*, 306 U. S. 363.

Taken as a group these cases imply quite strongly that transfers may be deemed to have testamentary attributes to the extent necessary to sustain the constitutionality of a statute explicitly taxing them, even though, as a matter of interpretation, they would not be considered testamentary in the absence of such an express provision.

If Congress should amend Section 302 to include transfers in which there is a possibility of reverter, these cases would unquestionably sustain the validity of such an amendment, prospectively applied. But the implication

of all of them, read in connection with cases like *Reinecke v. Northern Trust Co.* and *May v. Heiner, supra,* is that it is in the constitutional field that the reluctance of the Court to be governed by niceties and legalistic concepts finds its greatest expression. This, it is submitted, is perfectly sound in principle. Where Congress can choose the words, the taxpayer is in all fairness entitled to a liberal measure of reliance upon the legal meaning of those words.

III.

A POSSIBILITY OF REVERTER IS NOT SUCH A PROPERTY INTEREST THAT ITS OBLITERATION BY THE DEATH OF THE GRANTOR EFFECTS THAT TRANSFER OF PROPERTY OR OF ECONOMIC BENEFITS WHICH IS THE SUBJECT OF THE ESTATE TAX.

The cases above cited and discussed show that for Section 302(c) to tax a transfer there must be some real element of property or of economic benefit of property passing from the possession, enjoyment or control of the grantor at his death. It is submitted that the termination by death of a possibility of reverter does not meet that test.

Obviously the destruction of such a possibility by death is very different from the termination by death of a power of revocation or to designate beneficiaries. (*Cf. Reineke v. Northern Trust Co.,* 278 U. S. 339; *Sanford v. Commr.,* No. 34, present term, and *Rasquin v. Humphreys,* No. 37, present term.) Not only is a power of revocation a substantial incident of ownership of the property (*Chase National Bank v. United States,* 278 U. S. 327), but whether the property will revert depends solely upon the will of the grantor. The happening of the condition upon which a possibility of reverter based upon some person's death may be fulfilled becomes entirely beyond the control of the grantor the moment the conveyance is executed.

It is plain that in any realistic sense a possibility of reverter such as in the *St. Louis Trust Company* cases is not property or an estate in property, and to regard it as such would be founding a tax upon a refinement which approaches a fiction. Furthermore, the extinguishment of the possibility, while terminating any reversionary interest of the grantor and thus indirectly causing some change in the technical nature of the remainder, does not in itself transmit the grantor's retained interest or any interest to another person.

Prior to the specific amendment of Section 302(d) a remainder was not includable in the gross estate even though dependent upon the termination of a preceding life estate retained by the grantor. If in this situation the death of the grantor does not cause a shifting of the possession and enjoyment of the property to the remainderman and thus bring about a taxable transaction, *a fortiori* nothing is shifted or transmitted when a possibility of reverter comes to an end.

These views as to the true nature of a possibility of reverter are in harmony with what petitioner characterizes as technical principles of the early common law and with such expressions as there have been by the Ohio courts.[1]

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[1] In *Gilpin v. Williams*, 25 O. S. 283, 297, in which was involved the question of whether the legislature could pass an act affecting estates created before its passage, the court said:

> "There is a clear distinction between contingent estates which may vest, and vested estates which may be defeated, upon the happening of a future event. There are also other rights (so called) which do not rise to the dignity of estates at all, but are mere expectancies or possibilities, such as those of heirs apparent, possibilities of reverter, etc. It may be admitted that the legislature may control these at its pleasure; but the question before us relates to vested estates in expectancy, although subject to be divested upon the happening of an uncertain future event."

See also *Needles vs. Needles*, 7 O. S. 432; *Branch v. Cemetery Assn.*, 11 O. C. C. 185.

Assuming a case where a young wife creates a trust, the property to revert to her if she survives her elderly husband, her possibility of reverter becomes in practical effect a probability. But in most trusts the probability is against the happening of the condition upon which reverter will take place and in many the possibility is remote indeed. For example, a very usual type of transfer is where a grantor transfers property by a trust instrument giving the income to his wife for life and upon her death the principal to his three children or the survivor of them, with the proviso that if he shall survive his wife and children the property shall revert to him.[1] Here the possibility is so remote as to be almost non-existent and the imposition of a tax would be an extremely unjust ignoring of realities. But manifestly the degree of remoteness of the possibility cannot judicially be made a test of taxability.

Kindred difficulties surround the application of the judicial process to the ascertainment of the value of the possibility of reverter. The Government claims that it is the value of the remainder interest in the trust property which is to be included in the gross estate under Section 302(c), but this, it is submitted, is viewing the taxing law as a succession rather than as a transfer tax. If the tax is upon the transmission of property from the dead to the living, then it is in no sense to be measured by the value of the remainder. If there is to be any tax at all it must be on what the grantor retained. This would require an attempt to value the possibility of reverter itself.

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[1] Illustrations of trusts of this general nature are found in *Trust Company v. Field*, 10 F. Supp. 635, *Bonney v. Commissioner*, 29 B. T. A. 45, *Nichols v. Bradley*, 27 Fed. (2d) 47, *Tait v. Trust Co.*, 74 F. (2d) 851, *Wheeler v. Commissioner*, 20 B. T. A. 695, *Commissioner v. Grosse*, 100 F. (2d) 37. This list is by no means exhaustive, but only illustrative of the extreme remoteness of the possibility of reverter in many trusts.

Any actuarial formulae from which such a valuation may be arrived at would give the most artificial results. Common sense and experience tell us that ordinarily the value of a possibility of reverter depending upon a father surviving his daughter is more imaginary than real. It would seem impossible judicially to arrive at any just and satisfactory method of valuation. This difficulty does not restrict the right of Congress to amend the statute, tax the transfers and adopt some rule which it regards as appropriate for measuring the value of the reverter; but it does, we submit, inhibit the judicial construction of the general language of Section 302(c) as imposing any tax in this case.

IV.

WHETHER THE EFFECTIVE ADMINISTRATION OF THE ESTATE TAX LAW REQUIRES THE APPLICATION OF SECTION 302(c) ADVOCATED BY THE GOVERNMENT IS A MATTER FOR CONGRESSIONAL ACTION EXCLUSIVELY, AND CONGRESS HAS INDICATED ITS SATISFACTION WITH THE SECTION AS HERETOFORE CONSTRUED.

The position of the administrative branch of the Government in urging a new construction of Section 302(c) is based at least in part upon considerations of policy and expediency in the administration of the law. It is submitted that the result advocated is one to be reached, if at all, by the legislative process and not by judicial construction, especially where such construction would retrospectively overturn an established rule.

Laying aside technical questions of statutory interpretation, it is not to be presumed that Congress desires or at any time has desired that transfers subject to possibilities of reverter be taxed, or feels that they are essentially testamentary or that their taxation is necessary to prevent tax avoidance. On the contrary, the evidence points the other way.

On November 11, 1935, the day the decisions in the *St. Louis Trust Company* cases were announced, *White v. Poor*, 296 U. S. 98, was also decided. The trust involved in that case was terminable by the joint action of three trustees, of whom the decedent was originally one. She resigned as trustee, but later, upon the resignation of her successor, was reappointed under a clause in the trust instrument providing for the filling of such vacancy. It was held that the power thus acquired to participate in terminating the trust, not being in any sense a power reserved by the decedent in the trust instrument, was not a power to "alter, amend or revoke" within the meaning of Section 302 (d) of the Revenue Act of 1926.

Just as soon as possible, in Section 805 of the Revenue Act of 1936, Congress indicated its dissatisfaction with this result by amending Section 302 (d) so as to prevent the application of the decision in *White v. Poor*, the amendment being expressly made prospective in operation.[1]

It would be difficult to imagine a stronger case of legislative acquiescence in the judicial construction of a statute than this shows as to the attitude of Congress toward the

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[1] The House Committee Report on Section 805 of the Revenue Act of 1936 as contained in the original bill was in part as follows:

> "The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White v. Poor*, 296 U. S. 98. Although in that case the decedent had created a trust which was at her death subject to a power to terminate, existing in the decedent as trustee in conjunction with two other trustees, nevertheless the Supreme Court held that Section 302 (d) did not require the inclusion in the gross estate of the decedent of the property subject to such power of termination. * * * It is, therefore, provided that Section 302 (d) covers a power whether created at the time of transfer or thereafter arising from any source and whether exercisable in an individual or representative capacity."

House Committee Report on H. R. 12793, part of which was later adopted with changes in the Revenue Act of 1936.

St. Louis Trust Company decisions. Coming as they did simultaneously with the decision in *White v. Poor* and affecting the same general subject matter and the same section of the Act interpreted by the latter decision, no conclusion can be reached but that Congress had them in mind when the amendment was under consideration and was content with them.

If it should be said that there may have been insufficient time between November 11, 1935, and the passage of the Revenue Act of 1936 for the effect of the *St. Louis Trust Company* decisions to have been fully realized by Congress and desired action taken, such a suggestion would be overcome by the circumstances that three additional revenue acts have since been passed, none of which has touched Section 302(c), although one of them was avowedly for the purpose of preventing tax avoiding practices.[1]

Another striking illustration of what has been the practice when Congress has not acquiesced in decisions interpreting Section 302(c) or has felt that effective tax administration requires a different construction, is found in what happened to the section after the decisions in *May v. Heiner, Burnet v. Northern Trust Co., Morsman v. Burnet,* and *McCormick v. Burnet, supra,* which held the section inapplicable to irrevocable transfers where the grantor retains a life interest in the income. So quickly did Congress act, that the amendment of Section 302(c) to change the result of these decisions was passed, under suspension of the rules, on the day after the decisions in the three *Burnet* cases, the last day of the session. See *Hassett v. Welch,* 303 U. S. 303, 309.

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[1] Revenue Acts of 1937, 1938 and 1939. The 1937 Act was entitled—"An Act to Provide Revenue, Equalize Taxation, Prevent Tax Evasion and Avoidance and For Other Purposes." The 1938 Act contained (Sections 501-505) certain amendments of the estate and gift tax laws. The 1939 Act consists primarily of amendments to the income tax laws, although Section 403 amends the estate tax law in two minor respects.

Certainly such prompt action showed that Congress thought that transfers with a life estate reserved to the grantor were basically testamentary and ought to be reached by the estate tax law. The absence of similar action for four active Congressional years after the *St. Louis Trust Company* decisions is a strong indication of Congressional concurrence with the principle of those cases.

If it is going too far to say that such legislative acquiescence necessarily or conclusively shows express agreement with the construction of Section 302(c) heretofore made (for reasons stated *infra* we think that such explicit agreement must be considered to exist), it is at least significant as showing no feeling that the *St. Louis Trust Company* cases are any substantial hindrance to the effective administration of the estate tax law. It is easy to see why this is so. Without the amendment to Section 302(c) by the Joint Resolution of March 3, 1931, it is certain that an immense amount of property would have escaped the estate tax. Multitudes of tax conscious people would doubtless have set up trusts under which they could have continued to enjoy the income of their property, but no comparable opportunity for tax avoidance is offered by the *St. Louis Trust Company* decisions. In the great majority of cases where trust instruments create possibilities of reverter, the grantor can have no thought that he is retaining anything approximating the substance of enjoyment of the property. In the typical case the possibility is worth little or nothing and is inserted merely that every possible contingency may be covered. From its very nature it is not a highly material condition or one which, in the mind of a grantor, is related to tax avoidance.

Under date of March 18, 1937, Article 17 of Treasury Regulations 80 was amended by the addition of the following paragraph:

"On the other hand, if, as a result of the transfer, there remained in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be included in the gross estate merely by reason of a provision in the instrument of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

Article 17 as so amended not only adopts the principle of the *St. Louis Trust Company* decisions, but states quite aptly the very distinction between those cases and the *Klein* case which is now claimed to be unsound and unsatisfactory.

The amended regulation was in effect when the Internal Revenue Laws, including the Estate Tax Law, were codified by the Act of February 10, 1939. Section 302(c) was reenacted by this act, as Section 811(c). Thus, in the present year, Congress has in effect expressly adopted the construction of Section 302(c) by the *St. Louis Trust Company* cases and the Treasury Regulation following them.

In *Copper Queen Consolidated Mining Co. v. Arizona*, 206 U. S. 474, at p. 479, it was said by Mr. Justice Holmes:

"And again, when for a considerable time a statute notoriously has received the construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

Again, it is stated in the opinion in *Hassett v. Welch*, 303 U. S. 303, at p. 312:

"Not only is the legislative history of Section 803(a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought. Moreover, the reenactment of the Resolution of 1931 in the light of

the administrative rulings requires the conclusion that Congress approved and adopted the administrative construction of the provision it reenacted."

Of like effect are *Hecht v. Malley*, 265 U. S. 144; *Massachusetts Mutual Life v. United States*, 288 U. S. 269; *Murphy Oil Co. v. Burnet*, 287 U. S. 299; *Harley v. Commissioner*, 295 U. S. 216; *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1.

Granting some show of reason to the petitioner's position that he should not be prejudiced by an amendment of a regulation into which he felt he was forced by a decision of this Court,[1] the argument is of no avail when following the amendment of the regulation Congress, after four years of inaction on the subject, reenacts the cognate statute.

It is therefore submitted that the problem is within the legislative province and that under the circumstances here the disapproval of the *St. Louis Trust Company* cases would amount to a judicial amendment of Section 302(c), contrary to the actual intention which must now be ascribed to Congress with reference to the meaning of the section.

An important practical aid to the ascertainment of the real intention of Congress is found in the relation of the Gift Tax Law to the situation. It is fair to say that a transfer like those in the *St. Louis Trust Company* cases, where a grantor parts with all control over his property and where it can only revert to him on the happening of a condition beyond his power to direct, is one which a practical minded legislator would think ought to be subject to

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[1] But see *Sanford v. Commissioner*, *supra*, in which it is stated:

"A change of practice to conform to judicial decision, such as has occurred since the decision in the *Hesslein* case, or to meet administrative exigencies, will be accepted as controlling when consistent with our decisions."

the Gift Tax as a consummated gift. In *Sanford v. Commissioner*, Docket No. 34 at this term, it is said:

> "The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together." (Citing *Burnet v. Guggenheim,* 288 U. S. 280); and

> "We think, as was pointed out in the *Guggenheim* case, *supra*, 285, that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death, one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete."

If transfers like those in the *St. Louis Trust Company* cases are held to be subject to the estate tax, there should therefore be no gift tax upon them. But to hold them not taxable under the Gift Tax Law would go far beyond any of the principles so far announced in cases like *Burnet v. Guggenheim,* and *Sanford v. Commissioner, supra,* and would seem to carry possibilities of inconsistencies and confusion in the administration of the Gift Tax Law.

In any event this may present an added reason for the undoubtedly conscious action and conduct of Congress after the *St. Louis Trust Company* decisions. It may well have been in the legislative mind that if transfers such as were there involved are not taxable at death they are when executed and, having regard to the fact that transfers of this nature do not readily lend themselves to tax avoiding devices, it is a fair inference that Congress desires the law to remain as it is.

V.

THIS COURT'S DECISIONS APPLYING THE DOCTRINE OF STARE DECISIS ARE PERSUASIVE IN FAVOR OF ADHERENCE TO THE ST. LOUIS TRUST COMPANY CASES.

Assuming, *arguendo,* that the rule of the *St. Louis Trust Company* cases should no longer be approved by the Court, the question arises whether the Court shall overrule them, or shall adhere to the rule as settled, leaving it to Congress to make such change, if any, as it may deem necessary. The question involves the exercise of judicial discretion and is one upon which this Court has often spoken.

The fundamentals of the doctrine of *stare decisis* are explained in the dissenting[1] opinion of Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.,* 285 U. S. 393, at page 405:

> "*Stare decisis* is not, like the rule of *res adjudicata,* a universal, inexorable command. 'The rule of *stare decisis,* though one tending to consistency and uniformity of decision is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Hertz v. Woodman,* 218 U. S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank v. Whitney,* 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial

[1] This case involved constitutional limitations. It was overruled by *Helvering v. Producers Corp.,* 303 U. S. 387.

and error, so fruitful in the physical sciences, is appropriate also in the judicial function.'"[1]

In *National Bank v. Whitney*, 103 U. S. 99, it was held that a national bank might enforce a mortgage, against the mortgagee and parties claiming under him with notice, not only as to then existing but also as to after acquired indebtedness. The Court regarded itself as bound by *National Bank v. Matthews*, 98 U. S. 621. The opinion delivered by Mr. Justice Field states, page 102:

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[1] An analysis of those cases in which this Court has departed from rules heretofore declared by it (collected by Mr. Justice Brandeis, 285 U. S. 406-409, and supplemented by later research) has resulted in no case being found by respondents in which this Court has departed from an earlier decision (not involving constitutional grounds and therefore amenable to legislative action) except in cases where there existed no possibility of harm sufficient to outweigh the desirability of a correct decision. The following cases are illustrative of the character of the legal question where the Court has felt free to overrule earlier pronouncements where nonconstitutional questions were involved.

C. E. & I. Railroad v. Industrial Commission, 284 U. S. 296 (whether a railroad employee when injured was, under the facts, to be regarded as engaged in interstate commerce under the Federal Employers Liability Act); *Lee v. C. & O. Ry.*, 260 U. S. 653, (whether a right of removal to the federal court existed when neither plaintiff nor defendant was a resident of the state); *Rosen v. U. S.*, 245 U. S. 467, (whether one convicted of forgery might testify against his codefendant); *Roberts v. Lewis*, 153 U. S. 367, (the interpretation of a particular will under local law of Nebraska); *Mason v. Eldred*, 6 Wall. 231, (the common law rule that a judgment against one joint contractor bars an action against others and merges the contract with the judgment); *Vidal v. Gerard's Executors*, 2 Howard 127, (the right of the City of Philadelphia to accept property in trust by devise); *Gazzam v. Lessee of Phillips*, 20 Howard 372, (the method of determining the quantity of land granted to a patentee under a preemption. The earlier decision was "controlled." There the court recognized the "possibility" of disturbing some rights but felt that an adherence to the earlier erroneous rule would cause more confusion); *Hornbuckle v. Toombs*, 18 Wall. 648, (whether the procedure in territorial courts was to be governed by that applicable to district and circuit courts or left to the territorial legislatures); *U. S. v. Phelps*, 107 U. S. 320, (time within which an importer may apply for appraisement of damaged goods to reduce customs duty. The court overruled the earlier decision.

"The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future."[1]

[1] It is not essential in order to validly argue that the rule of e *St. Louis Trust Company* cases ought to be adhered to because widespread reliance thereon, that it be shown that Mr. Hallock lied upon that rule. Manifestly he did not rely on it, because his ath preceded the decision of those cases. That the considerations reliance are of a general nature and that its presence is not sential in any given case is shown by *National Bank v. Whitney.* iat case was decided at the October, 1880 term. The case by iich the Court regarded itself as bound, *National Bank v. Matews*, was decided at the October, 1878 term. The Court's asmption that national banks had conducted their business and ide loans in reliance upon the rule had chief reference therefore the period between 1878 and 1880. The mortgage loan involved the *Whitney* case, however, had been made in 1872.

(Continued from p. 42.)

d its action in so doing was *against* the revenue interests of the ited States); *Fairfield v. Gallatin County*, 100 U. S. 47, (overling an earlier decision that a county in Illinois had no power issue bonds under the Illinois constitution. A new Illinois decin had intervened favorable to the validity of the bonds. The ision sanctioned the rights of investors and did not disturb m); *Brenham v. German American Bank*, 144 U. S. 173, (the ver to issue negotiable bonds held not to be implied from power borrow money. The overruled cases were held to have been eady overruled in effect by later cases. The Court suggests sible recovery if the action not brought "directly" on the ids); *U. S. v. Nice*, 241 U. S. 591, (upholding the Congressional ver to prohibit or regulate sale of intoxicating liquor to Ins).

The view expressed in the dissent in *Burnet v. Coronado Oil & Gas Co., supra,* i.e. that which favors a quite rigid application of the rule of *stare decisis* where mere statutory construction is involved, as contrasted with a flexible approach where constitutionality is concerned and Congress can afford no remedy, is the prevailing rule. Thus in *Erie R. Co. v. Tompkins,* 304 U. S. 64, in which the doctrine of *Swift v. Tyson,* 16 Peters 1, namely, that insofar as general law is concerned, federal courts will apply their own common law, was held unconstitutional and overruled, the majority opinion states, p. 77:

> "The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. *If only a question of statutory construction were involved, we should not be prepared to abandon the doctrine so widely applied throughout nearly a century.* But the unconstitutionality of the course pursued has now been made clear and compels us to do so." (Counsel's emphasis.)

In *Boston Store v. American Gramaphone Co.,* 246 U. S. 8, deciding that stipulations in a contract of sale of a patented article fixing the price on resale are void under the general law and not within the monopoly conferred or the remedies afforded by the patent law, the majority leaned heavily upon certain earlier decisions. Although apparently in doubt as to their soundness Mr. Justice Brandeis concurred in a separate opinion, saying at p. 28:

> "I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been appealed to."

the views of Mr. Justice Sutherland, concurred in by . Justice McReynolds and Mr. Justice Butler, in the dist in *United States v. Raynor*, 302 U. S. 540, at p. 552.

The Nature of Judicial Process (Cardozo) states at ge 146:

"I say, therefore, that in the vast majority of cases the retrospective effect of judge-made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared. I think it is significant that when the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld."

And on p. 149 we find:

"I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

is latter consideration is important. Granted that the se division of the Court in the *St. Louis Trust Company* es indicates sharp conflict in judicial thought, the anmcement of another rule might be similarly conditioned. t inevitably, but very possibly, the Court a few brief rs hence might again be besought for reconsideration.

In speaking of the wisdom of rules which lead to cernty and repose in our judicial system, Judge Robert von schzisker in *XXXVII Harvard Law Review*, page 409, is article entitled "Stare Decisis in Courts of Last Ret," said on page 413:

"For the purpose of keeping the law standardized so it may be knowable to all, the doctrine of *stare decisis* dictates that decisions formally reduced to judg-

ment shall thereafter be followed as precedents; that is to say, the law of such decisions,—even though thought to be wrong in principle or to have been incorrectly applied,—shall not be departed from in subsequent cases where a departure is apt to do more harm than would occur should the decision be allowed to stand until the legislature might see fit to change the rules of conduct there laid down or acted upon. But if, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration."

The question here before the Court is one of statutory construction and involves no question of constitutionality. As in *National Bank v. Whitney*, 103 U. S. 99, this Court may take account of the fact that many business transactions have been entered into upon the strength of the decisions which it is now sought to have this Court overrule. That the rule crystallized in its final form but four years ago is not important, because it must be the frequency, character and size of transactions entered into rather than the number of calendar years involved which determine whether a rule of law has become so far entrenched as to warrant its retention until Congress shall act.

We are dealing not with a single decision but with a true series of decisions. The cases preceding the *St. Louis Trust Company* cases and which are akin in principle are set out at pages 19 to 21, *supra*. Some of the cases following and approving the *St. Louis Trust Company* cases are the following: *Bingham v. U. S.*, 296 U. S. 211; *Commissioner v. Grosse*, 100 F. (2d) 37; *Commissioner v. Kaplan*, 102 F. (2d) 329; *Rothensies v. Cassell*, 103 F. (2d) 834 (argued herewith); *Corning v. Commissioner*, 104 F. (2d) 329; *Blakeslee v. Smith*, 26 F. Supp. 28 (semble); *Bailey*

v. U. S., 27 F. Sup. 617, (semble); *Nicholson v. U. S.*, 25 F. Sup. 424; *Commissioner v. Brooks*, 87 F. (2d) 1000-3; *Mackay v. Commissioner*, 94 F. (2d) 558; *Old Colony Trust Co. v. U. S.*, 15 F. Sup. 417, 422-3; *Myers v. Magruder*, 15 F. Sup. 488, 493; *U. S. v. Nichols*, 92 F. (2d) 704; *Knee-land*, 34 B. T. A. 816; *John T. H. Mitchell* 37 B. T. A. 1, 8; *Waldo C. Bryant*, 36 B. T. A. 669, 676.

Congress has power to amend Section 302(c).

That Congress may correct the situation if a change in the law be advisable is clear. In fact Congress only can adequately do so. This is because the Congressional desire may be either (a) to keep the law as it is or (b) to tax all transfers otherwise taxable even though there remains to the transferor nothing more than a possibility of reverter, or (c) to tax certain transfers of the character last above described but not all. In this latter connection it is pointed out that transfers completed and vested containing possibilities of reverter may be of many differing types, some of which Congress may desire to tax and some not. This is because the possibility of reverter has in some cases a substantial value and in some no real value whatever.[1]

It cannot be that Congress intended that all such cases were to be taxed, but, if the rule of the *St. Louis Trust Company* cases is to be abandoned, inevitably all come within the ambit of taxation. The judicial process cannot draw a rigid line of demarcation. The legislative process can draw the line of taxability rigidly wherever it may in its wisdom choose. Congress might make taxability depend upon the

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[1] It is only a partial answer to this argument that the carving out of the various life estates would radically reduce the value of the remainder. No matter to what point the value of the remainder is reduced there would remain a tax on a possibility which, viewed practically, is of no value whatever.

number of lives whose predecease must occur before the reverter takes place or upon the ages of the beneficiaries in relation to that of the donor or upon any other criterion of probability that the reverter will take place; or Congress might be contented to leave the law as this Court four years ago declared it to be. All of these considerations argue for leaving to Congress a delicate matter much more properly of legislative than of judicial significance.

Petitioner states, page 28 of his brief, "The problem is one which cannot readily be dealt with by amendatory legislation. It would be unsatisfactory, if not almost impossible, to attempt to describe in the statute the numerous limitations of estates by which transfers are made to take effect in possession or enjoyment at or after the death of the grantor." We submit that the argument is utterly without merit. Passing the unsupported assumption that Congress desires to deal with the problem by amendatory legislation, we point out that mere difficulty, short of impossibility, in arriving at a solution does not call for a relaxation of the settled rules of law which guide this Court in determining whether to adhere to an earlier determination. But no real difficulty exists. If Congress should desire to tax all transfers in which there exists a possibility of reverter, Congress may do so quite simply. All that is required is an additional sentence in Section 302(c) stating in appropriate language that if a transfer is otherwise taxable under that section, the fact that the transferor may have retained a possibility of reverter shall not render the transfer nontaxable; or perhaps that in enforcing the section no distinction shall be drawn between vested interests transferred subject to divestiture by condition subsequent and contingent interests to come into being upon condition precedent; or that a retention by the transferor of any reversionary interest, however denominated, shall require inclusion in the gross estate. To be realistic about it, if the *St. Louis Trust Company* cases had been decided

differently the Commissioner would have had no trouble in laying down clear regulations sufficient to enable him to collect his taxes.

Congress may very well decide to keep the law as declared in the *St. Louis Trust Company* cases. Whether in that respect Congress is acting wisely is for Congress to determine. It is not essential that reasons be ascribed for the contentment of Congress. One possible reason however is apparent. As heretofore pointed out Congress may well have reasoned that adequate revenue will be produced through gift taxation and that estate taxation related to the same subject is not important.

It is submitted that the conclusion that Congress intends the law to remain as it is is inevitable. As shown above, four times since the decision of the *St. Louis Trust Company* cases Congress has enacted revenue legislation. The 1937 Act was specifically intended to prevent tax avoidance and would have covered transfers with possibilities of reverter had Congress thought they were being used to avoid taxes.

These conclusions as to Congressional intent are fortified by the fact that as heretofore shown Congress has never been unwilling promptly to produce amendatory legislation whenever it has felt it required by decisions of this Court. Such considerations, as well as the recodification in 1939 of the Revenue Laws, are, we submit, cogent factors to be considered in connection with the wisdom of applying the rule of *stare decisis.*

Petitioner makes the sweeping assertion that the decisions of this Court have substantially deprived Section 302 (c) of all substance, but his own brief demonstrates that to the extent that Congress has regarded this Court's decisions construing Section 302 as impairing the efficacy of that section and kindred sections, it has easily remedied the situation at once by amendment. Thus the statute is by no means without substance.

As the entire Section 302 now stands, where a transfer is otherwise complete and irrevocable but the donor retains some real incident of ownership or property which is thought to be properly taxable the matter is specifically covered by various subsections.

The general language of Section 302 (c) covering transfers intended to take effect in possession or enjoyment at or after death is intended for the sole purpose of reaching transfers where the grantor has in some way retained in himself during his life the use, benefit or control of the property, i.e., transfers where the gift remains ambulatory during the life of the donor in the sense of being subject to recall or other disposition at his will. A typical example of such transfers is the conditional delivery of an unrecorded deed not to be delivered to the grantee until the grantor's death. Other typical cases are shown in the footnote.[1] Congress can add to them if it be wise.

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[1] The following cases, in most of which the *Klein* case was cited, furnish a few examples of transfers held to be taxable as intended to take effect at death: *Commissioner v. Schwarz*, 74 Fed. (2d) 712 (where income was payable to grantor if living at his sister's death; otherwise to the grantor's descendants); *Union Trust Company v. U. S.*, 54 Fed. (2d) 152 (Court of Claims (where decedent delivered stock endorsed in blank to a bank as trustee under an agreement that it should be held for the joint lives of himself and wife and upon the death of one should be delivered to the survivor, the decedent having the right to the income meanwhile); *Bryant v. Commissioner*, 36 B. T. A. 669 (where property was transferred to a trustee under agreement for payment of income to the decedent's wife for life, then to decedent for life, the principal to be paid to the decedent's estate upon the death of the survivor); *Jaeger v. Commissioner*, 33 B. T. A. 989 (where decedent endorsed stock certificates to his several children and delivered them to a son with a statement that he could have them transferred and delivered to the donees whenever he saw fit and dividends were received by the decedent until his death); *Trust Company v. Commissioner*, 27 B. T. A. 972 (where trust agreement made net income payable to decedent's two daughters for life and upon their respective deaths the corpus was to be paid to decedent if living and if not to such persons as he might appoint by will).

Another strong intendment in favor of applying the rule of *stare decisis* arises by analogy from the rule that where doubts exist in respect of the interpretation of a tax statute they should be resolved in favor of the taxpayer. To be sure the rule is by no means inexorable and attempts of taxpayers to use it as a sword rather than a shield have been rejected by the Court. Nevertheless the doctrine, when based upon a real doubt, seems fundamentally sound. If doubts of the character stated shall be resolved in favor of the taxpayer when the highest court in the land has not spoken, they should, we submit, ' e resolved in favor of the taxpayer when the highest court in the land has authoritatively spoken and is being asked to change its view rather than await the action of the legislative branch.

It is submitted, both upon principle and authority, that the Court's judicial discretion should be exercised in favor of not overruling the *St. Louis Trust Company* cases even though the Court should think that they ought not to have been decided as they were.

Respectfully submitted,

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Walker H. Nye,
Ashley M. Van Duzer,
Counsel for Respondents in Cases Nos. 110 and 111.

W. H. Annat,
Counsel for Respondent in Case No. 112.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 111.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

VS.

MARY Q. HALLOCK, EXECUTRIX OF THE ESTATE OF HENRY HALLOCK, DECEASED, RESPONDENT.

No. 183.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

VS.

LINFORD B. CASSELL, EXECUTOR OF THE ESTATE OF GEORGE F. UBER, DECEASED, RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH CIRCUIT AND THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE.

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Amicus Curiae.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE.

Interest of Amicus Curiae, Blatchford Downing.

The interest of the undersigned, an attorney of the Bar of this Court, is that he is attorney for the respond-

ent taxpayers in a certain cause entitled "*Guy T. Helvering, Commissioner, Petitioner, v. Mercantile Commerce Bank & Trust Company, a corporation, and Virginia G. Donnelly, co-administrators de bonis non of the Estate of Paul F. Donnelly, deceased, respondents, No. 11572,*" now pending before the United States Circuit Court of Appeals for the Eighth Circuit on petition by the Commissioner for review of the decision of the same matter by the United States Board of Tax Appeals reported in 38 B. T. A. 1234, which cause involves as a major contention on behalf of the Commissioner, the same point that is primarily involved in the cases at bar.

Nature of Cases and Questions Involved.

In the *Hallock* case decedent, Henry Hallock, as grantor during his lifetime, by act *inter vivos* and not in contemplation of death, created a trust for the benefit of his wife, Anne Lamson Hallock, in contemplation of divorce between them, for her life ~~with remainder over in fee to the Hallock children,~~ but with provision that if the life beneficiary, Anne, predeceased grantor, Henry Hallock, the property should revert to said grantor ~~for his life with remainder over~~ if & then to the Hallock children.

In the *Rothensies* case, the decedent, George F. Uber, as grantor, in his life, by act *inter vivos* and not in contemplation of death, created a trust for the benefit of his fiancee, R. S., with provision that if the beneficiary, R. S., predeceased grantor, the trust properties should revert in fee to grantor, but if the beneficiary should after the marriage, survive the grantor, the trust should terminate and the properties remain vested in the beneficiary, freed from the trust.

In each case the grantor predeceased the beneficiary.

The question presented is: Does the existence of the possibility of reverter to grantor in the event of the death of the first beneficiary in grantor's life, operate to cause incidence of the estate tax upon the estate of grantor at

his death, the first beneficiary having survived. A difference between the two cases consists in the fact that in the Hallock case the first beneficiary's estate was for life only with remainder to the Hallock children subject to the intervening possibility of reverter to grantor ~~for the remainder of his life only and~~ if living then to the children, while in the Rothensies case there was no remainder over to third parties. The difference is, we submit, immaterial in view of the suggestions which we desire to present for the Court's consideration.

SUMMARY OF THE ARGUMENT.

(a)

The scope and express terms of the provisions of Sec. 302 (c) and (d) are restricted in application to include in gross estate, transfers *inter vivos* which are of types reasonably adaptable for use as devices to evade the tax, *i. e.*, to retain economic benefit; accomplish the equivalent of a testamentary disposition at death; and yet avoid the estate tax. The transfers involved herein are the diametric opposite. Grantor did not *retain* but *alienated* the economic enjoyment. He did this for the duration of the life of the first beneficiary, an indeterminate term capable of exceeding grantor's life. The reverter, to grantor, contingent upon death of the first beneficiary and grantor's survivorship, would if it materialized defeat instead of accomplish the equivalent of a testamentary disposition free from estate tax.

The provisions of Sec. 302 (c) and (d) create exceptions to transfers *inter vivos*, which would otherwise be exempt from estate tax. They cannot be enlarged beyond their strict language, nor interpreted to include transfers having none of the fundamental characteristics of testamentary dispositions. The intent of Congress to preserve the distinction between the scope of the Gift Tax Act and that of the Estate Tax Act must be given effect. *Sanford's Estate* v. *Commissioners* (No. 34. Present Term) emphasized that the distinction is to be preserved.

(b)

While the Estate Tax is properly imposed upon a *shift* of economic benefits caused by death, regardless of technical refinements of title, the question whether the shift was caused by death, as the generating source, or by act *inter vivos*, is determined by the test whether at

decedent's death grantor had retained any *power to change* at will the ultimate devolution of the property. If this power to change the economic shift was terminated at and by death, the Estate Tax applies. If it was terminated by act *inter vivos* (and not in contemplation of death, or with retention of beneficial ownership and enjoyment for duration of grantor's life or for period equivalent thereto in practical result) the Estate Tax does not apply.

(c)

The possible reverter to grantor contingent upon his survivorship of the life beneficiary could not materialize, or take effect in possession or enjoyment at or after grantor's death. It had to do so, if at all, during his life. In such event it would thereafter be subject to estate or gift taxes.

(d)

Since grantor's interest, and the fact of retention or no retention, was contingent upon grantor's survivorship of the life beneficiary, the taxability of the fund is likewise contingent on such survivorship by grantor. Since the contingency did not occur, taxability did not occur.

(e)

The government is not cheated of its taxes. The contingent reverter, not having vested or materialized, is as if it had not been. If it had materialized and been transformed into a vested estate in grantor, it would thereafter be subject to estate tax or gift tax upon its termination by death or alienation by gift.

(f)

To impose an estate tax when there was no vested property interest capable of transfer from dead to living or capable of valuation to measure the tax at death,

would be so arbitrary and fictitious as to violate the intent of Congress to preserve the distinction between Estate Tax and Gift Tax, and thereby also violate the Fifth Amendment.

(g)

The St. Louis Union Trust Co. cases were in the light of the subsequent manifestations of the Congressional *intent*, as indicated in *Sanford's Estate* v. *Commissioner*, correctly decided. *Klein* v. *United States* is distinguishable.

ARGUMENT.

I.

Section 302 (c) of the Act Is Applicable Neither by Its Terms Nor Its Spirit and Intent to the Trusts Here Involved.

In contending that Section 302 (c) of the Act is applicable to the trusts here involved, we respectfully suggest that counsel for the Commissioner overlook the essential distinction between retention of a life estate preceding the estate granted and the creation of a contingent remainder, or a mere possibility of reverter after the estate granted. Retention of a life estate assures to grantor the economic enjoyment for life and accomplishes the equivalent of a testamentary disposition thereafter. The creation of a contingent remainder or mere possibility of reverter in favor of grantor after the termination of the life estate granted, on the other hand, is precisely the opposite. It relinquishes present enjoyment; and the possible reverter, if it ever materializes, by the very same contingency defeats accomplishment of the equivalent of a testamentary disposition. It revests the property in the grantor, *thereafter* to become subject to estate tax on his death.

Section 302 (c) of the Act as amended by the joint resolution of March 3, 1931, and the Revenue Act of 1932, provides for inclusion in the gross estate to the extent of any interest of which decedent has at any time made a transfer, "intended to take effect in possession or enjoyment at or after his death." This is the fundamental or paramount provision of the section, of which the subsequent clauses are enlargements for the safeguarding of this fundamental clause. Obviously the possible reverters here under consideration can never take effect

at or *after* grántor's death. On the direct contrary, they can only take effect, if at all, in his life. His death occurring prior to the death of the life beneficiary, will completely defeat them.

Coming to the succeeding clauses of the section, the grantor in these trusts has not retained for his life or for any period having relation to his death within the meaning of the section, the possession or enjoyment of, or the right to the income from, the property. On the contrary, far from retaining such, he has expressly alienated the possession, enjoyment and right to the income for the life of the first beneficiary, an indefinite period of duration unknown to grantor and beyond his control; with possibility, as actually transpired, of depriving him of all further ownership, control or enjoyment.

The creation of this reverter being only a possible reverter dependent upon events beyond grant[illegible] control was not a *retention* of the use, possession or income from the property, or of control thereof. It was on the contrary a divestiture thereof. If the contingency occurred it would result in the vesting of a new or subsequent estate, springing into being only upon the happening of the contingency (thereafter to be subject to gift or estate tax). It would not be an estate retained by him, nor one of duration extending from the date of the grant to his death equivalent to a retention of ownership for life. The provisions of Section 302 (c) and (d) subjecting to the estate tax certain types of transfers *inter vivos* are limited to those types of transfer which would be appropriate and reasonable to be resorted to by anyone seeking to avoid estate taxes, while at the same time accomplishing the equivalent of a taxable testamentary disposition. It is entirely competent and appropriate that Congress should by these provisions include within taxable transfers all such devices as might otherwise be reasonably resorted to to avoid the tax.

The transfers in the cases at bar are not such that any person would reasonably resort to them to evade the es-

tate tax by retaining the equivalent of beneficial enjoyment for life, and accomplishing the equivalent of a testamentary disposition thereafter. On the contrary, such transfers as these would defeat both objects. Instead of retaining beneficial enjoyment for life or a period having relation to the duration of donor's life, the grantor has *alienated* the beneficial ownership, and for a period to be determined by the life of the life beneficiary, a period which has no relation to grantor's life and may or may not exceed it. Instead of accomplishing the equivalent of a testamentary disposition after his own death, he has created a possibility that at the death of the life beneficiary the property may revest in grantor thereafter to be subject to estate taxes on his subsequent death.

In *Helvering* v. *Bullard,* 303 U. S. 297, the court said:

> "A further vindication of the exaction is the authority of Congress to treat as testamentary transfers with reservation of a power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in *Hassett* v. *Welch,* 303 U. S. 303, *post,* 858, 58 S. Ct. 559, decided this day, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York: 'It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate.' "

In *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, the court said, l. c. 89:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status, falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property

without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guaranty of due process is infringed."

The provisions of Sections 302 (c) and (d) are measures reasonably calculated to prevent avoidance of the tax, to the extent, and only to the extent, that they are applied strictly in accordance with their terms, to transfers which might reasonably have been resorted to as devices for avoidance of the tax.

These various provisions of Section 302 (c) and (d) relating to transfers *inter vivos* under which reservations are made of powers or interests for the grantor's life, powers of revocation or modification, etc., were grafted onto the main provision of subjecting to the estate tax transfers to take effect in possession or enjoyment at or after grantor's death, as extensions thereof to prevent evasions of the estate tax while accomplishing practically testamentary dispositions. They create exceptions to otherwise estate tax exempt transfers *inter vivos*, reasonably necessary to effectuate the true scope and purport of the estate tax.

To apply them to the transfers involved in the cases at bar, one a trust to secure alimony payments for life, the other to constitute a pre-nuptial gift in the nature of a marriage settlement, neither purpose being even remotely testamentary or tax evasive would be hyper-technical in the extreme.

The transfers were preeminently for purposes related to life, not death. It was, of course, necessary to provide for events of termination and subsequent devolution to avoid hiatus in the beneficial title, and the Rule Against Perpetuities.

The Court should not engraft by judicial decision further extensions of these provisions of Section 302 (c) and (d) beyond what the Congress has specifically en-

acted. Nor should it by judicial interpretation so enlarge the scope and effect of these exceptions to freedom of gifts *inter vivos* from death duties, as to distort the true scope and purport of the Act as applying solely to transfers essentially testamentary and transfers resorted to as substitutes for testamentary transfers to evade estate taxes.

The essential distinctions between gift taxes and estate taxes emphasized and given effect in *Sanford's Estate* v. *Commissioner* should be preserved.

The purposes of the amendments in 1932 to Section 302 (c) adopted to cover other ingenious devices to evade the estate tax are thus stated in the Senate Finance Committee's Report on the Revenue Bill of 1932 (Vol. 3, C. C. H. Service, 1939, Par. 3417.02, p. 5620):

> "(1) The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.
>
> "(2) The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter."

With respect to the possible applicability of the first paragraph above quoted to the cases at bar it is to be noted as elsewhere herein pointed out that the grantor

did not "reserve" or "retain" the trust income or the use, enjoyment, etc., of the property. "Reserve" and "retain" signify continuing to hold what one now holds.[1] Grantors herein alienated use, possession, ownership, enjoyment and income irrevocably without power to recall. The mere contingent possibility of a subsequent new revesting springing from the alienation on the death of the first beneficiary, if grantor survived, is not a retention or reservation nor one for a period in the ascertainment of which the date of the grantor's death was a necessary element.

With respect to the possible applicability of the second paragraph above quoted, note the additional clause in the next to the last sentence "or where he is to have the income from and after the death of another person until his own death, *and such other person predeceases him.*"

In the cases at bar the "other person," *i. e.*, the first beneficiary, did not predecease grantor. This language explanatory of the Congressional intent completely and specifically negatives and rebuts the applicability of Section 302 (c) to the cases at bar. On the other hand it confirms our contention that if the first beneficiary had predeceased the grantor, grantor would then be revested with an estate which would become taxable upon his subsequent death thereafter or subsequent alienation by gift. This exactly confirms that if the revesting is contingent the taxability is contingent.

The transfers in the cases at bar are not within the letter and certainly not within the spirit and intent of these amendatory provisions which are themselves exceptions to the general rule of estate tax exemption of transfers *inter vivos*.

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[1] "Reserve. 2. To keep back; to retain or hold over to a future time or place; not to deliver, make over, or disclose at once.

Retain. 2. To continue to hold, have, use, recognize, etc.; to keep in possession, control, use, custody, etc.; to keep; not to lose, part with, dismiss, or permit to escape."

Webster's New International Dictionary.

Again, the property interest which is to be included in the gross estate is to be valued as of the time of decedent's death. The only interest in the property transferred which decedent had at or prior to his death was the possibility of a reverter which did not materialize but was destroyed at his death. This possibility of reverter obviously had no value at any time; if the contingency of survivorship occurred, then for the first time, upon being transformed into a vested estate, it would have value, and would also thereafter be taxable at his death occurring subsequently. To attempt to create an artificial value by legislative fiat would be so contrary to fact and reason as to be utterly arbitrary and violative of the 5th Amendment. It would be like levying a poll tax upon "the man who was not there."

II.

The Incidence of the Estate Tax Is Dependent upon Termination by Death of the POWER TO CONTROL Further the Ultimate Devolution of Property. It Is Not Imposed upon Mere Change in Economic Benefit Resulting from Acts Completed Inter Vivos.

While it is true that the estate tax is imposed upon a shift in economic ownership of property regardless of technical refinements as to the legal title or estate therein involved, this tax is not imposed upon all shifts of ownership, but only upon those having their origin in death as the generating source, as distinguished from acts completed *inter vivos*.

To determine whether the economic shift owes its origin to death on the one hand or to act *inter vivos* on the other, the essential test is whether at death decedent retained any vestige of power to control the subsequent devolution of the property, or whether its devolution had been completely fixed beyond recall or change by act *inter vivos*.

In *Porter* v. *Commissioner*, 288 U. S. 436, the court said (l. c. 444):

> "But the reservation here may not be ignored for, while subject to the specified limitation, it made the settlor *dominant in respect of other dispositions* of both corpus and income. *His death terminated that control, ended the possibility of any change by him*, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. *That is the event on which Congress based the inclusion* of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in Section 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 116, 75 L. Ed. 867, 875, 51 S. Ct. 446" (italics supplied).

In *Sanford's Estate* v. *Commissioner*, (Docket No. 34, Present Term) ___ U. S. ___, 84 L. Ed. (Adv. Op.) 53, in construing the applicability of the gift tax, which is to be interpreted *in pari materia* with the estate tax, the donor had completely and irrevocably divested himself of all possibility of economic enjoyment beneficial to himself, of the property prior to the effective date of the Gift Tax Act, but he had retained the power to control the ultimate devolution of the property until his later relinquishment thereof after the effective date of the Gift Tax Act.

In *Sanford's Estate* v. *Commissioner*, the court said, L. Ed. Adv. Op. p. 56:

> "Since it was the relinquishment of the *power* which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied. Cf. *Nichols* v. *Coolidge*, 274 U. S. 531, 71 L. Ed. 1184, 47 S. Ct. 710, 52 A. L. R. 1081; *Helvering* v. *Helmholz*, 296 U. S. 93, 98, 80 L. Ed. 76, 80, 56 S. Ct. 68.
>
> "The rationale of decision in both cases is that 'taxation is not so much concerned with the refinements of title as it is with the actual *command* over

the property taxed.' See *Corliss* v. *Bowers*, 281 U. S. 376, 378, 74 L. Ed. 916, 917, 50 S. Ct. 336; *Saltonstall* v. *Saltonstall, supra* (276 U. S. 271, 72 L. Ed. 568, 48 S. Ct. 225); *Burnet* v. *Guggenheim, supra* (288 U. S. 287, 77 L. Ed. 752, 53 S. Ct. 369), and that a retention *of control* over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the *power is relinquished* whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with *power* reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself, is incomplete, and becomes complete so as to subject the transfer to death taxes only on *relinquishment of the power* at death" (Italics supplied).

This Court has held that although a grantor had in fact transferred in his lifetime the complete beneficial ownership of property yet, if he had reserved the right to recall or change the devolution thereof, even though such right was not in fact exercised, and even though it could not be exercised in his own favor, yet the termination of the right by death furnished the essential basis for the incidence of the estate tax.

This Court has consistently held that it is the termination, by death, of a retained power to control future devolution of property that determines incidence of the estate tax, while, on the other hand, if this termination of power to control is effected by act *inter vivos*, the Gift Tax Act and not the Estate Tax Act applies (assuming the gift is not in contemplation of death, nor with reservation of life estate to donor capable of being used as a device to evade).

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the court had held that the falling in of a life estate at death of the life tenant effecting transfer or economic shift to the remainderman under a trust created *inter vivos* was

not a transfer having its origin in death as a generating source, but had its origin in the *inter vivos* act of the settlor and hence was not within the terms of the Estate Tax Act.

Chase National Bank v. *U. S.*, 278 U. S. 327, decided on the same date, held, on the other hand, that where life insurance policies had by act *inter vivos* been made payable to beneficiaries, but the decedent had retained the right to recall or change beneficiaries, which right was terminated only at his death, the proceeds of the insurance were properly includible in the gross estate for estate tax purposes. The court in the Chase National Bank case emphasized that since the transfer was incomplete and not beyond control until death, death was the generating source, the court saying, 73 L. Ed. 409:

> "Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power, and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax. *Chanler* v. *Kelsey*, 205 U. S. 466, 51 L. Ed. 882, 27 Sup. Ct. Rep. 550."
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> * * * * * * *
>
> "As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424."

Consequently, if the power to change future devolution is completely relinquished *inter vivos*, the act *inter vivos* is the cause of the transfer or economic shift and death is not the generating source.

In *May* v. *Heiner,* 281 U. S. 238, decedent had created a trust with income payable to her husband during his life and upon his death to decedent for her life with remainder over to her children. The trust was irrevocable. In holding it not subject to estate tax as the act then read, the court said (l. c. 243):

> "It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

III.

Helvering v. St. Louis Union Trust Co. and Becker v. St. Louis Union Trust Co. Were Correctly Decided. Klein v. United States Is Distinguishable.

That *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48, were correctly decided and reached correct results is, we submit, amply confirmed by the recent decision in *Sanford's Estate* v. *Commissioner* (No. 34 Present Term), decided when the Congressional *intent* had become more manifest. Accordingly, the cases at bar should be affirmed. The essence of the matter is, we believe, clearly stated in *Helvering* v. *St. Louis Union Trust Co.,* 296 U. S., at pages 41-53, which we ask the Court to consider in the light of the Sanford's Estate case.

If we may be permitted to suggest it, does not the dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.* overlook, or at least not give sufficient importance to, the predominate idea that Section 302 (c) of the Act was to govern gifts *inter vivos* which, by their provisions, are "intended to take effect in possession or enjoyment at or after death" and thereby accomplish the same result in practical effect as a testamentary disposition? When,

as in the St. Louis Union Trust Co. case and in the cases at bar, the grantor alienated and divested himself of the immediate possession or enjoyment, by granting the life estate to the immediate beneficiary, he effected the direct opposite of a retention of the possession or enjoyment for his life or the equivalent thereof. He alienated them for the period of the life beneficiary's life. If the contingent reverter was, at the death of the first life beneficiary, to revert to grantor only in the event he was then alive, obviously it was not one to take effect at or after his death, but the direct contrary.

If the contingency had occurred and the possibility of reverter had materialized, then grantor would have been again vested with a ~~life~~ estate which he had himself created in his own favor ~~with remainder over~~, but not with one which he had *retained*, since he had alienated it beyond his power to change, dominate or control. It might then, at his death *thereafter*, properly become subject to estate taxes under Section 302 (c) upon his subsequent death. On the other hand, if the first contingency does not occur, grantor will never become revested with anything and will not have retained anything. In other words, since the revesting in grantor is contingent upon his survivorship of the life beneficiary, the taxability of the trust at his death is, likewise, contingent upon his surviving the life beneficiary. He will have created an estate to take effect at or after his death only in the event he shall have survived the life beneficiary, a contingency irrevocably fixed *inter vivos* and beyond his control.

Furthermore, does not the dissenting opinion fail to give sufficient consideration to the essential point emphasized in *Sanford's Estate* v. *Commissioner* and in *Chase National Bank* v. *United States*, that if the future devolution of the property is irrevocably fixed by act *inter vivos*, beyond any reserved power of grantor to change or control any subsequent shift of the economic

benefit, it is not due to death as a generating source, but to the act *inter vivos*.

The provisions of Section 302 (c) for taxability where a life estate, or its equivalent, is retained are exceptions to and outside the scope of the principle that death must be the generating source of the transfer and were enacted for the purpose of preventing estate tax evasions by adoption of technical methods having the practical effect of accomplishing retention of ownership for life and a testamentary disposition thereafter. In the cases at bar, grantor did not *retain* a life estate continuing the economic enjoyment *in praesenti* at the execution of the trust, but, on the contrary, alienated the possession and enjoyment for the duration of the first life beneficiary. The grants were in no sense equivalent to testamentary dispositions either in their purpose or effect, and were not made as evasions or avoidance of estate taxes. See *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, l. c. 89.

Klein v. *United States*, 283 U. S. 231, is plainly distinguishable on its face, and as frequently pointed out both in the St. Louis Union Trust Company cases and numerous lower court decisions. The deed in the Klein case consisted of two sections—the first granting the wife merely a life estate, and the second granting her the fee upon the condition *precedent* that she survive grantor. The court emphasized the separateness of these two clauses, saying, "The two clauses of the deed are quite distinct—the first conveys the life estate; the second deals with the remainder." It was precisely as if two separate deeds had been executed—the first conveying a life estate immediately; the second embodying merely a conditional grant of the fee, which latter grant was to become effective only upon the death of grantor and grantee's survivorship. If the condition precedent of grantee's survivorship did not occur, the remainder fee would have remained vested in grantor and passed by

his will or under the laws of intestacy, not by virtue of the terms of the trust.

The distinction between a condition precedent to vesting of an estate, and a condition subsequent causing a divesting thereof, though it may seem technical may nevertheless be the determining factor as to whether property passes by will or intestacy and subject to administration, or passes by virtue of the deed and without administration. The attempt to impose an estate tax upon a transfer, nontestamentary in character and intent, merely because there was included a mere possibility of reverter that never in fact materialized, is, we submit, decidedly more technical and devoid of justifying basic substance.

In fact in *Klein* v. *United States*, 283 U. S. 231, upon which the Commissioner relies so heavily, the decision essentially turned on the distinction between a condition precedent to the vesting of the grant and a condition subsequent which might cause a divesting. In the first instance there would be a "retaining" unless and until the contingency occurred. In the second instance, there would be an immediate alienation subject merely to possible revesting. In the *Klein case* the Court said, l. c. 233:

> "By the second clause the grantee takes the fee in the event—'and in that case only'—that she shall survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen before that of the grantee. The grant of the remainder, therefore, was contingent."

In the cases at bar the original grant of the entire estate was not contingent upon a condition precedent. It was the possible reverter that was so contingent, the converse of the Klein case. Hence the Klein case supports the taxpayers' contentions herein.

IV.

Independently of Constitutional Power, It Is Not Within the Intent of Congress to Subject to Estate Tax Transfers Completely and Irrevocably Fixed by Act Inter Vivos When the Transfer Is Not in Contemplation of DEATH AND NO EQUIVALENT OF A LIFE ESTATE IS RESERVED.

In *Heiner* v. *Donnan*, 285 U. S. 312, the court held unconstitutional the provisions of Section 302 (d) of the Revenue Act of 1926 establishing a conclusive presumption that gifts made within two years of death were made in contemplation of death and, therefore. subject to the estate tax. In arriving at this conclusion that such a provision was so arbitrary and unjust as to violate the Fifth Amendment, the court pointed out that when a gift, completely executed *inter vivos*, without reservation of power to recall or change, and not made in contemplation of death, was subjected to the estate tax, certain utterly unreasonable and unjust results were entailed. The donor who received the entire property involved was subjected to no diminution in value thereof by the tax. The beneficiaries of the donor's estate upon his death, who had received no portion of the gift, were subjected to the burden of payment of tax on the gift. The amount of the tax was measured by the value of the property as of the time of donor's death not at its value as of the date of the gift.

In *Chase National Bank* v. *United States, supra,* when it was urged that a similar unjust result would be effected, the court sustained the constitutional validity of the incidence of the estate tax by pointing out that since the decedent had reserved the right to recall or change the beneficial interests under the insurance policies until his death, the gift was not complete until the death, hence, there was nothing unjust or unconstitutionally arbitrary in imposing the burden of the estate tax partly

upon the beneficiaries of the insurance, and partly upon the beneficiaries of the remaining estate, the amounts being valued as of the date of death as that was the final completion of the transfer.

In *Helvering* v. *Bullard*, 303 U. S. 297, the court held there was nothing *unconstitutional* in including for estate tax purposes a complete and irrevocable gift *inter vivos* (but which reserved a life estate to the grantor) inasmuch as Congress might by appropriate legislation have taxed the transfer as a gift and "it is of no significance that the exaction is denominated an estate tax or is found in a statute purporting to levy an estate tax," and the court held further that Congress might constitutionally classify gifts of different sorts and impose excise taxes at one rate upon a gift without reservation of life estate and at another rate upon gifts with such reservation. The events involved in *Helvering* v. *Bullard*, occurred during the interim between the repeal in 1926 of the 1924 gift tax and the reenactment of the Gift Tax Act of 1932. However, when Congress reenacted the Gift Tax Act and subsequently amended both it and the Estate Tax Act, it made no classification such as Mr. Justice Roberts suggested in the Bullard case, but on the contrary, gave expression to an intent to preserve the distinction between gift tax and estate tax. The distinction is, as forcibly illustrated by Mr. Justice Stone's opinion in *Sanford's Estate* v. *Commissioner*, that if the termination of the *power* to control the subsequent devolution of property was terminated by act *inter vivos*, then the transaction is governed by the Gift Tax Act. If the termination of this power is by death alone, it is subject to the Estate Tax Act.

In the case at bar the termination of all *power of control* had been completely effected by act *inter vivos*. It is an immaterial and fortuitous circumstance that at the time of such termination there may or may not have been a gift tax in effect. The intent of the Congress,

as distinguished from its constitutional power, in enacting and amending the Estate Tax Act is to be interpreted in accordance with these principles of *Sanford's Estate* v. *Commissioner.*

It should further be noted that in *Helvering* v. *Bullard,* the court relied for further constitutional support of the exaction on the fact that in that case the decedent had retained a true life estate and the court relied (303 U. S. 1. c. 301-302) upon "the authority of Congress to treat as testamentary transfers with reservation of the power or interest in the donor" and further pointed out that the commonly used device for avoidance of estate taxes is a transfer with reservation of a life estate.

As heretofore pointed out, a reservation of a possibility of reverter is not the retention of a life estate, and if the reverter ever materializes, it is effective to restore the estate to the grantor, subjecting it to the possibility thereafter of estate tax and, accordingly, defeats any attempt to accomplish a testamentary disposition or to avoid succession taxes.

In the Hallock case now before the court, if the Commissioner's contentions should be sustained, there would be precisely the situation of arbitrary and unjust exaction which the court condemned as unconstitutional in *Heiner* v. *Donnan,* 285 U. S. 312, namely, the first wife, Anne Lamson Hallock, received and continues to enjoy the full beneficial use of the trust properties without diminution by payment of any tax, while the beneficiaries of Mr. Hallock's estate, presumably including his second wife as well as his children, are subjected to the imposition of the tax upon their shares of his estate, measured by the amount of value at his death of the property which he had in 1919 transferred in trust for the first wife. We

earnestly ask the Court to read and carefully consider that portion of the opinion in *Heiner* v. *Donnan*, 235 U. S., beginning at page 330 to page 332.

Respectfully submitted,

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pages 1, 2, 3, 5, 6, 10

SUPREME COURT OF THE UNITED STATES.

Nos. 110, 111, 112, 183 and 399.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 110 *vs.* Mary Q. Hallock and Central United National Bank of Cleveland, Trustees. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 111 *vs.* Mary Q. Hallock, Executrix, Estate of Henry Hallock, Deceased. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 112 *vs.* S. H. Squire, Superintendent of Banks of the State of Ohio, etc.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
Walter J. Rothensies, Collector of Internal Revenue for the First District of Pennsylvania, Petitioner, 183 *vs.* Craig Huston, Administrator d.b.n.c.t.a. of the Estate of George F. Uber, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
Waldo G. Bryant and Ida Bryant, Executors of the Estate of Waldo C. Bryant, Deceased, Petitioners, 399 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 29, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

These cases raise the same question, namely, whether transfers of property *inter vivos* made in trust, the particulars of which will later appear, are within the provisions of § 302(c) of the Revenue

Act of 1926.[1] They were heard in succession and may be decided together. In each case the Commissioner of Internal Revenue included the trust property in the decedent's gross estate. In Nos. 110, 111 and 112 ~~affecting three beneficiaries under the same instrument~~ this determination was reversed by the Board of Tax Appeals (34 B. T. A. 575) and the Board was affirmed by the Circuit Court of Appeals for the Sixth Circuit (102 F. (2d) 1). In No. 183, the taxpayer paid under protest, successfully sued for recovery in the District Court for the Eastern District of Pennsylvania, and his judgment was sustained by the Circuit Court of Appeals for the Third Circuit. (103 F. (2d) 834). In No. 399, the Commissioner was in part successful before the Board of Tax Appeals (36 B. T. A. 669) and the Circuit Court of Appeals for the Second Circuit affirmed the Board (104 F. (2d) 1011).

Neither here nor below does the issue turn on the unglossed text of § 302(c). In its enforcement, Treasury and courts alike encounter three recent decisions of this Court, *Klein* v. *United States*, 283 U. S. 231, *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, *Ibid.* 48. Because of the difficulties which lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the estate tax law, we brought the cases here. 308 U. S. —; *Ibid.* —; *Ibid.* —. All involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor

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[1] c. 27, 44 Stat. 9, as amended by § 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

n a contingency terminable at his death. Whether the transfer le by the decedent in his lifetime is "intended to take effect in session ~~and~~ enjoyment at or after his death" by reason of that ch he retained, is the crux of the problem. We must put to one questions that arise under sections of the estate tax law other n § 302(c)—sections, that is, relating to transfers taking place leath. Section 302(c) deals with property not technically pass- at death but with interests theretofore created. The taxable nt is a transfer *inter vivos*. But the measure of the tax is the ue of the transfered property at the time when death brings it enjoyment. or r

Ve turn to the cases which beget the difficulties. In *Klein United States, supra,* decided in 1931, the decedent during lifetime had conveyed land to his wife for her lifetime, "and he shall die prior to the decease of said grantor then and in that nt she shall by virtue hereof take no greater or other estate in lands and the reversion in fee in and to the same shall in that nt remain vested in said grantor, ..." The instrument fur- r provided, "Upon condition and in the event that said grantee l survive the said ~~said~~ grantor, then and in that case only the l grantee shall by virtue of this conveyance take, have, and hold said lands in fee simple, ..." The taxpayer contended t the decedent had reserved a mere "possibility of reverter" that such a "remote interest",[2] extinguishable upon the grant- s death, was not sufficient to bring the conveyance within the koning of the taxable estate. This Court held otherwise. It ected formal distinctions pertaining to the law of real property rrelevant criteria in this field of taxation. "Nothing is to be ned", it was said, "by multiplying words in respect of the ious niceties of the art of conveyancing or the law of contingent vested remainders. It is perfectly plain that the death of the ntor was the indispensable and intended event which brought the er estate into being for the grantee and effected its transmis- from the dead to the living, thus satisfying the terms of the ng act and justifying the tax imposed." *Klein* v. *United States,* ra, at 234.

he inescapable rationale of this decision, rendered by a unani- s Court, was that the statute taxes not merely those interests h are deemed to pass at death according to refined technicali-

[2] etitioner's Brief, Klein v. United States, pp. 11-13.

ties of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor. It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law. Surely the *Klein* decision was not intended to encourage the belief that a change merely in the phrasing of a grant would serve to create a judicially cognizable difference in the scope of § 302(c), although the grantor retained in himself the possibility of regaining the transferred property upon precisely the same contingency. The teaching of the *Klein* case is exactly the opposite.[3]

In 1935 the *St. Louis Trust* cases came here. A rational application of the principles of the *Klein* case to the situations now before us calls for scrutiny of the particulars in the *St. Louis* cases in order to extract their relation to the doctrine of the earlier decision.

In *Helvering* v. *St. Louis Trust Co., supra,* the decedent had conveyed property in trust, the income of which was to be paid to his daughter during her life, but at her death "If the grantor still be living, the Trustee shall forthwith . . . transfer, pay, and deliver the entire estate to the grantor, to be his absolutely." But "If the grantor be then not living" then the income was to be devoted to the settlor's wife if she were living, and upon the death of both daughter and wife, if he were not living, the trust property was to go to the daughter's children, or if she left none, to the grantor's next of kin.

In *Becker* v. *St. Louis Trust Co., supra,* the decedent had declared himself trustee of property with the income to be accumulated or, at his discretion, to be paid over to his daughter during her life. The instrument further provided that "If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or . . . if I should die before her death, then this property shall thereupon become hers immediately and absolutely . . . ."

[3] Some indication of the influence of Klein v. United States upon the lower courts may be found in Sargent v. White, 50 F. (2d) 410 and Union Trust Co. v. United States, 54 F. (2d) 152, cert. denied, 286 U. S. 547. Cf. Commissioner v. Schwarz, 74 F. (2d) 712.

On the authority of the *Klein* case the Commissioner had included the taxable estates the gifts to which, in the *St. Louis Trust* cases, grantor's death had given definitive measure. If the wife had deceased the settlor in the *Klein* case, he would have been re-essed of his property. His wife's interests were freed from this tingency by the husband's prior death, and because of the effect his death this Court swept the gift into the gross estate. So in *lvering* v. *St. Louis Trust Co.*, the grantor would have become ossessed of the granted corpus had his daughter predeceased him. t he predeceased her and by that event her interest ripened to l dominion. The same analysis applies to the *Becker* case. In three situations the result and effect were the same. The event ich gave to the beneficiaries a dominion over property which y did not have prior to the donor's death was an act of ure outside the grantor's "control, design or volition." 296 S. 39, 43. But it was no more and no less "fortuitous", so far he grantor's "control, design or volition" was concerned, in the *Louis Trust* cases than it was in the *Klein* case. In none of the ee cases did the dominion over property which finally came to beneficiary fall by virtue of the grantor's will, except by his vision that his own death should establish such final and com-te dominion. And yet a mere difference in phrasing the circum-nce by which identic interests in property were brought into ng—varying forms of words in the creation of the same ~~weedly~~ worldly erests—was found sufficient to exclude the *St. Louis Trust* settle-nts from the application of the *Klein* doctrine.

'our members of the Court saw no difference. They relied on governing principle of § 302(c) that Congress meant to in-le in the gross estate *inter vivos* gifts "which may be resorted as a substitute for a will, in making dispositions of property rative at death." 296 U. S. at 46. To effectuate this purpose ctical considerations applicable to taxation and not the "niceties he art of conveyancing" were their touchstone. "Having in d", said the dissenters, "the purpose of the statute and the dth of its language it would seem to be of no consequence what icular conveyancers' device—what particular string—the de-nt selected to hold in suspense the ultimate disposition of his berty until the moment of his death. In determining whether able transfer becomes complete only at death we look to sub-ce, not to form . . . . However we label the device it is a means by which the gift is rendered incomplete until the

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donor's death." 296 U. S. at 47. For the majority in the *St. Louis Trust Company* cases, these practicalities had less significance than the formal categories of property law. The grantor's death, the majority said, in *Helvering* v. *St. Louis Trust Co.*, "simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility." 296 U. S. 39, 43. This was precisely the mode of argument which had been rejected in *Klein* v. *United States, supra.*

We are now asked to accept all three decisions as constituting a coherent body of law, and to apply their distinctions to the trusts before us.

In Nos. 110, 111 and 112 (*Helvering* v. *Hallock*) the decedent in 1919 created a trust under a separation agreement, giving the income to his wife for life, with this further provision:

> "If and when Anne Lamson Hallock shall die and in such event . . . the within trust shall terminate and said Trustee shall . . . pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall . . . deliver forthwith to Party of the First Part, the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike . . . ."

When the settlor died in 1932, his divorced wife, the life beneficiary, survived him. The Circuit Court of Appeals held that the trust instrument had conveyed the "whole interest" of the decedent, subject only to a "condition subsequent," which left him nothing "except a mere possibility of reverter." *Commissioner* v. *Hallock*, 102 F. (2d) 1, 3-4.

In No. 183 (*Rothensies* v. [redacted]) the decedent by an ante-nuptial agreement in 1925 conveyed property in trust, the income to be paid to his prospective wife during her life, subject to the following disposition of the principal:

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> "In trust if the said Rae Spektor shall die during the lifetime of said George F. Uber to pay over the principal and all accumulated income thereof unto the said George F. Uber in fee, free and clear of any trust.
>
> "In trust if the said Rae Spektor after the marriage shall survive the said George F. Uber to pay over the principal and

> all accumulated income unto the said Rae Spektor—then Rae Uber—in fee, free and clear of any trust."

Mrs. Uber outlived her husband, who died in 1934. The Circuit Court of Appeals deemed *Becker* v. *St. Louis Trust Co.* controlling against the inclusion of the trust corpus in the gross estate.

Finally, in No. 399 (*Bryant* v. *Helvering*), the testator provided for the payment of trust income to his wife during her life and upon her death to the settlor himself if he should survive her. The instrument, which was executed in 1917, continued:

> "Upon the death of the survivor of said Ida Bryant and the party of the first part, unless this trust shall have been modified or revoked as hereinafter provided, to convey, transfer, and pay over the principal of the trust fund to the executors or administrators of the estate of the party hereto of the first part."

There was a further provision giving to the decedent and his wife jointly during their lives, and to either of them after the death of the other, power to modify, alter or revoke the instrument. The wife survived the husband, who died in 1930. The Board of Tax Appeals allowed the Commissioner to include in the decedent's gross estate only the value of a "vested reversionary interest" which the Board held the grantor had reserved to himself. On appeal by the tax-payer, the Circuit Court of Appeals sustained this determination.

The terms of these grants differ in detail from one another, as all three differ from the formulas of conveyance used in the *Klein* and *St. Louis Trust* cases. It therefore becomes important to inquire whether the technical forms in which interests contingent upon death are cast should control our decision. If so, it becomes necessary to determine whether the differing terms of conveyance now in issue approximate more closely those used in the *Klein* case and are therefore governed by it, or have a greater verbal resemblance to those that saved the tax in the *St. Louis Trust* cases. Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law. The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignoring the other. Attempts by the Board of Tax Appeals and the Circuit Courts of Appeal to ad-

minister § 302(c) by reference to these distinctions abundantly illustrate the inevitable confusion.[4] One of the cases at bar, No. 399, reveals vividly the snares which inevitably await an attempt to base estate tax law on the "niceties of the art of conveyancing." In connection with the ascertainment of its own death duties, the Supreme Court of Errors of Connecticut defined the nature of the interest which the decedent in that case retained after his *inter vivos* transfer. *Bryant* v. *Hackett*, 118 Conn. 233. And yet the nature of that interest under Connecticut law and the scope of the Connecticut Court's adjudication of that interest were made the subject of lively controversy before us. The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes.[5] These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin.[6] Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of § 302(c), or whether we are to multiply gossamer distinctions between the

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4 See, for example, the attempts by the Board of Tax Appeals to deal with the peculiarities of New York law in the field of vested and contingent remainders. Elizabeth B. Wallace, 27 B. T. A. 902; Louis C. Raegner, Jr., 29 B. T. A. 1243. In both of these cases limitations which would probably have been "contingent" at "common law" were held to be "vested" under the New York statutory rule. Cf. Commissioner *v.* Schwarz, 74 F. (2d) 712; Flora M. Bonney, 29 B. T. A. 45.

5 Cf. Lyeth *v.* Hoey, 305 U. S. 188, 194. See Paul, The Effect on Federal Taxation of Local Rules of Property in Selected Studies in Federal Taxation (2nd Series), pp. 23-28; Developments in the Law—Taxation, 47 Harv. L. Rev. 1209, 1238-41; Note, 49 Harv. L. Rev. 462.

6 See, for example, Fearne, Contingent Remainders, (4th Am. Ed.), pp. 3-241; Gray, Rule Against Perpetuities (2nd Ed.), pp. 99-118; VII Holdsworth, History of English Law, 81 *et seq.*; 1 Simes, Future Interests, §§ 64-96. The confusion apt to be engendered by judicial forays into this field is well illustrated by the use of the term "possibility of reverter" by the majority in Helvering *v.* St. Louis Union Trust Co. "A possibility of reverter" is traditionally defined as the interest remaining in a grantor who has conveyed a determinable fee. The definition has not been thought to have any relation to the reversionary interest of a grantor who has transferred either a vested or contingent remainder in fee. See Gray, Rule Against Perpetuities (2nd Ed.), §§ 13-51.

present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Trust* cases, the *Klein* case furnishes such a harmonizing principle. Does, then, the doctrine of *stare decisis* compel us to accept the distinctions made in the *St. Louis Trust* cases as starting points for still finer distinctions spun out of the tenuosities of surviving feudal law? We think not. We think the *Klein* case rejected the presupposition of such distinctions for the fiscal judgments which § 302(c) demands.

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions.

Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.[7] Congress may not have had its attention di-

[7] We are not unmindful of amendments to the estate tax law to which other decisions of this Court gave rise. Thus by § 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Congress undid the construction which this Court gave the estate tax law in another connection by a decision rendered on the same day as were the St. Louis Trust cases. Cf. White *v.* Poor, 296 U. S. 98. This case arose under § 302(d) and not § 302(c). But, in any event, the fact of Congressional action in dealing with one problem while silent on the different

rected to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reëxamination by this Court of distinctions which it had drawn.[8] Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

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problems created by the St. Louis Trust cases, does not imply controlling acceptance by Congress of those cases.

By the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, Congress displaced the construction which this Court put upon § 302(c) in those cases wherein it was held that the reservation by a decedent of a life estate in property conveyed *inter vivos*, did not constitute a sufficient postponement of the remainder to bring it into the grantor's gross estate. May *v.* Heiner, 281 U. S. 238; Burnet *v.* Northern Trust Co., 283 U. S. 782; Morsman *v.* Burnet, 283 U. S. 783; McCormick *v.* Burnet, 283 U. S. 784. The speculative arguments that may be drawn from *ad hoc* legislation affecting one set of decisions and the want of such legislation to modify another set of decisions dealing with a somewhat different though cognate problem are well illustrated by this remedial amendment. For it may be urged with considerable plausibility that in 1931 Congress had in principle already rejected the general attitude underlying the St. Louis Trust cases, as illustrated by the fact that in those cases the majority, in part at least, relied upon the Congressionally discarded May *v.* Heiner doctrine.

Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present problem. Since the decisions in the St. Louis Trust cases, Congress has not re-enacted § 302(c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without reenacting § 302(c). Nor has Congress, under any rational canons of legislative significance, by its compilation of internal revenue laws to form the Internal Revenue Code of 1939, 53 Stat. 1, impliedly enacted into law a particular decision which, in the light of later experience, is seen to create confusion and conflict in the application of a settled principle of internal revenue legislation.

Here, unlike the situation in such cases as National Lead Co. *v.* United States, 252 U. S. 140, 146-47, and Murphy Oil Co. *v.* Burnet, 287 U. S. 299, 302-3, we have no conjunction of long uniform administrative construction and subsequent reenactments of an ambiguous statute to give ground for implying legislative adoption of such construction. See Preface, Internal Revenue Code, 53 Stat. III; compare Smiley *v.* Holm, 285 U. S. 355, 373, and Warner *v.* Goldtra, 293 U. S. 155, 161.

[8] Since the Treasury has amended its regulations in an effort to conform administrative practice to the compulsions of the St. Louis Trust cases, it cannot be deemed to have bound itself by this change. Art. 17, Reg. 80 (1937 Ed.), p. 42. Cf. Estate of Sanford *v.* Commissioner of Internal Revenue, 308 U. S. — (decided November 6, 1939).

This Court, unlike the House of Lords,[9] has from the beginning rejected a doctrine of disability at self-correction. Whatever else may be said about want of Congressional action to modify by legislation the result in the *St. Louis Trust* cases, it will hardly be urged that the reason was Congressional approval of those distinctions between the *St. Louis Trust* and the *Klein* cases to which four members of this Court could not give assent. By imputing to Congress a hypothetical recognition of coherence between the *Klein* and the *St. Louis Trust* cases, we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity of distinctions which this Court has itself created. Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it. We therefore reject as untenable the diversities taken in the *St. Louis Trust* cases in applying the *Klein* doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere.

In Nos. 110, 111, 112 and 183, the judgments are

Reversed.

In No. 399, the judgment is

Affirmed.

The CHIEF JUSTICE concurs in the result upon the ground that each of these cases is controlled by our decision in *Klein* v. *United States*, 283 U. S. 231.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[9] London Street Tramways Co., Ltd. *v.* London County Council, [1898] A. C. 375. But the rule is otherwise in the Privy Council. Read *v.* Bishop of Lincoln, [1892] A. C. 644, 655. For the rôle of precedent in English law, see, *inter alia*, 2 Yorke, Life of Lord Chancellor Hardwicke, pp. 425, 498; Goodhart, Precedent in English and Continental Law, 50 L. Q. Rev. 40; Holdsworth, Case Law, *ibid.* 180; Lord Wright in Westminster Council *v.* Southern Ry. Co., [1936] A. C. 511, 562-63; Allen, Law in the Making, 3rd ed., pp. 224 *et seq.*

SUPREME COURT OF THE UNITED STATES.

Nos. 110, 111, 112.—OCTOBER TERM, 1939.

Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Hallock, et al.	}	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 29, 1940.]

Mr. Justice ROBERTS.

There is certainly a distinction in fact between the transaction considered in *Klein* v. *United States*, 283 U. S. 231, and those under review in *Helvering* v. *St. Louis Union Trust Company*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Company*, 296 U. S. 48. The courts, the Board of Tax Appeals, and the Treasury have found no difficulty in observing the distinction in specific cases. I believe it is one of substance, not merely of terminology, and not dependent on the niceties of conveyancing or recondite doctrines of ancient property law.

But if I am wrong in this, I still think the judgments in Nos. 110-112, and 183 should be affirmed and that in 399 should be reversed. The rule of interpretation adopted in the *St. Louis Union Trust Company* cases should now be followed for two reasons: *First*, that rule was indicated by decisions of this court as the one applicable in the circumstances here disclosed, as early as 1927; was progressively developed and applied by the Board of Tax Appeals, the lower federal courts, and this court, up to the decision of *McCormick* v. *Burnet*, 283 U. S. 784, in 1931; and has since been followed by those tribunals in not less than fifty cases. It ought not to be set aside after such a history. *Secondly*. The rule was not contrary to any treasury regulation; was, indeed, in accord with such regulations as there were on the subject; was subsequently embodied in a specific regulation, and, with this background, Congress has three times reenacted the law without amending § 302(c) in respect of the matter here in issue. The settled doctrine, that reenactment of a

statute so construed, without alteration, renders such construction a part of the statute itself, should not be ignored but observed.

1. The Revenue Act of 1926 lays a tax upon the transfer of the net estate of a decedent. That estate is defined to embrace the value of all his property, real or personal, tangible or intangible (less certain deductions), at the time of his death.[1] As the Treasury Department stated in its earliest regulations: "The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate."[2] In all the treasury regulations, from the earliest to the one now in force, applicable to the relevant sections of the successive Revenue Acts defining the "gross estate" of a decedent the Treasury has used this language:[3]

"The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where [in the case] the contingency does not happen in the lifetime of the decedent, *and the interest consequently lapses at his death.*" (Italics supplied.)

The next sentence: "Nor should anything be included on account of a life estate in the decedent," has been repeated in substance in the corresponding article of all subsequent regulations.

If by the will of his grandmother A is given a life estate, with remainder to another, his executor is not bound to return anything on account of the life estate because, in respect of it, nothing passes on A's death. The estate simply ceases. The Treasury has never contended the contrary. If, however, A's grandmother gave a life estate to B, and the remainder to A, A has something which, at his death, will pass to someone else under his will, or under the intestate laws. The statute plainly taxes the value of the interest thus transferred at A's death.

If A's grandmother, by her will, gave interests in succession to specific persons and then provided that if A should outlive all these persons the property should pass to him, A would have a chance to receive and enjoy the property. If he did so receive it, it would pass as part of his estate. If he died before the other beneficiaries named by his grandmother his death would deprive him of that chance. The chance would not pass to any-

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[1] Secs. 300-303, 44 Stat. 69-72.

[2] Regulations 37, Art. 12 (1917).

[3] Regulations 37, Art. 12; Regulations 63, Art. 11; Regulations 68, Art. 11; Regulations 80, Art. 11.

one else. No tax would be laid on the supposed value of his contingent interest or chance, because the chance cannot, at his death pass by his will, or the intestate laws, to another. I do not understand the Government has ever denied this.

Subsection (c) of § 302 lays down no different rule respecting similar interests created by irrevocable deed or agreement of the decedent. The subsection directs that there shall be included in the gross estate the value, at the time of the decedent's death, of any interest in property of which the decedent has at any time made a *transfer* "intended *to take effect* in possession or enjoyment *at* or after his *death*" (excluding sales for adequate consideration).

A transfer can only take effect, within the meaning of the statute, by the shifting of possession or enjoyment from the decedent to living persons. The fact that the terms of the gift bring about some other effect at the decedent's death is immaterial. The fact that something may happen in respect of the beneficial enjoyment of the property conditioned upon the decedent's death is irrelevant so long as that something is not the shifting of possession or beneficial enjoyment from the decedent. This is made clear by *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347.

If A makes a present irrevocable transfer in trust, conditioned that he shall receive the income for life and, at his death, the principal shall go to B, B is at once legally invested with the principal. A's life estate ceases at his death. Nothing then passes. There is no tax imposed by the statute because there is no transfer any more than there would be in the case of a similar life estate given A by his grandmother. (This is *May* v. *Heiner*, 281 U. S. 238.) If, on the other hand, A creates an estate for years or for life in B, retaining the remaining beneficial interest in the property for himself, and, whether by the terms of the grant, or by the terms of A's will, or under the intestate law, that remainder passes to some one else at his death, such passage renders the transfer taxable. (This is *Klein* v. *United States, supra.*) If what A does is to transfer his property irrevocably, with provision that it shall be enjoyed successively by various persons for life and then go absolutely to a named person, but that if he, A, shall outlive that person, the property shall come back to him, and A dies in the lifetime of the person in question, A has merely lost the chance that the beneficial ownership of the property may revert to him. That chance cannot pass under his will or under the intestate laws

As there is no transfer which can become effective at his death by the shifting of any interest from him, no tax is imposed. (This is *McCormick* v. *Burnet, supra,* and *Helvering* v. *St. Louis Union Trust Company, supra.*)

2. These governing principles were indicated as early as 1927[4] and were thereafter developed, in application to specific cases, in a consistent line of authorities.

In *May* v. *Heiner, supra,* it was held that a transfer in trust under which the income was payable to the transferor's husband for his life and, after his death, to the transferor during her life, with remainder to her children, was not subject to tax as a transfer intended to take effect in possession or enjoyment at or after death. This court said (p. 243):

" . . . At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death *was obliterated by that event.*" (Italics supplied.)

It will be noted that this is the equivalent of the Treasury's statement, *supra,* that such an interest lapses at death.

That decision is indistinguishable in principle from the St. *Louis Union Trust Company* cases and the instant cases; and what was there said serves to distinguish the *Klein* case.

McCormick v. *Burnet* followed *May* v. *Heiner*. The court there held that neither a reservation by the grantor of a life estate with remainders over, nor a provision for a reverter in case all the beneficiaries should die in the lifetime of the grantor, made the gifts transfers intended to take effect in possession or enjoyment at or after the grantor's death. In the Circuit Court of Appeals the Commissioner urged that the provision for payment of the trust estate to the settlor in case she survived all the beneficiaries rendered the transfer taxable. That court dealt at length with the point and sustained his view. (43 F. (2d) 277, 279.) The Commissioner made the same contention in this court, but it was overruled upon the authority of *May* v. *Heiner.*

Then came the two *St. Louis Union Trust Company* cases, decided upon the authority of *May* v. *Heiner* and *McCormick* v. *Burnet.* Finally, the *McCormick* case was followed in *Bingham* v. *United States,* 296 U. S. 211.

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[4] Shukert v. Allen, 273 U. S. 545.

Since the opinion of the court appears to treat the *St. Louis* cases as the origin of the principle there announced, it is important to emphasize the fact that the rule had been settled by this court as early as 1930; and to note other decisions rendered prior to the *St. Louis* cases. In seven, intervening between *May* v. *Heiner* and the *St. Louis* cases, the Board of Tax Appeals reached the same conclusion as that announced in the *St. Louis* cases.[5] The Board's action was affirmed in four of them.[6] Four other decisions by Circuit Courts of Appeal were to the same effect.[7] In practically all, reliance was placed upon *Shukert* v. *Allen*, *Reinecke* v. *Northern Trust Company*, *May* v. *Heiner*, and *McCormick* v. *Burnet*, or some of them. Thus, when the question came before this court again in the *St. Louis* cases, there was a substantial body of authority following and applying the *Heiner* and *McCormick* cases.

Since the *St. Louis* cases were decided, the principle on which they went has been repeatedly applied by the Board of Tax Appeals and the courts. The Board has followed the cases in no less than seventeen instances.[8]

The record is the same in the courts. The *St. Louis* cases have been followed in fourteen cases.[9] In some of these the Government has sought review in this court but in none, except those now presented, has it asked the court to overrule those decisions.

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[5] Wheeler *v.* Commissioner, 20 B. T. A. 695; Duke *v.* Commissioner, 23 B. T. A. 1104; Peabody *v.* Commissioner, 24 B T. A. 787; Dunham *v.* Commissioner, 26 B. T. A. 286; Taylor *v.* Commissioner, 27 B. T. A. 220; Wallace *v.* Commissioner, 27 B. T. A. 902; Bonney *v.* Commissioner, 29 B. T. A. 45.

[6] Commissioner *v.* Duke, 62 F. (2d) 1057 (affirmed by an equally divided court, 290 U. S. 591); Commissioner *v.* Wallace, 71 F. (2d) 1002; Commissioner *v.* Dunham, 73 F. (2d) 752; Commissioner *v.* Bonney, 75 F. (2d) 1008.

[7] Commissioner *v.* Austin, 73 F. (2d) 758; Tait *v.* Safe Deposit & Trust Co., 74 F. (2d) 851; Tait *v.* Safe Deposit & Trust Co., 78 F. (2d) 534; Helvering *v.* Heimholz, 75 F. (2d) 245. I have been able to find only one case decided *contra*: Commissioner *v.* Schwarz, 74 F. (2d) 712.

[8] Taft *v.* Commissioner, 33 B. T. A. 671; Guaranty Trust Company *v.* Commissioner, 33 B. T. A. 1225; Kneeland *v.* Commissioner, 34 B. T. A. 816; Kienbusch *v.* Commissioner, 34 B. T. A. 1248; Schneider *v.* Commissioner, 35 B. T. A. 183; Van Sicklen *v.* Commissioner, 35 B. T. A. 306; Patterson *v.* Commissioner, 36 B. T. A. 407; Rushmore *v.* Commissioner, 36 B. T. A. 450; Bryant *v.* Commissioner, 36 B. T. A. 669; Wetherill *v.* Commissioner, 36 B. T. A. 1259; Mitchell *v.* Commissioner, 37 B. T. A. 1; Stone *v.* Commissioner, 38 B. T. A. 51; Harter Bank *v.* Commissioner, 38 B. T. A. 387; White *v.* Commissioner, 38 B. T. A. 593; Donnelly *v.* Commissioner, 38 B. T. A. 1234; Pyeatt *v.* Commissioner, 39 B. T. A. 774; Dravo *v.* Commissioner, 40 B. T. A. 309.

[9] Old Colony Trust Co. *v.* United States, 15 F. Supp. 417; Myers *v.* Magruder, 15 F. Supp. 488; Chase National Bank *v.* United States, 28 F. Supp. 947; Commissioner *v.* Brooks, 87 F. (2d) 1000; Bullard *v.* Commissioner, 90 F. (2d)

If there ever was an instance in which the doctrine of *stare de-*
isis should govern, this is it. Aside from the obvious hardship
nvolved in treating the taxpayers in the present cases differently
rom many others whose cases have been decided or closed in ac-
ordance with the settled rule, there are the weightier considera-
ions that the judgments now rendered disappoint the just ex-
ectations of those who have acted in reliance upon the uniform
onstruction of the statute by this and all other federal tribunals;
nd that, to upset these precedents now, must necessarily shake the
onfidence of the bar and the public in the stability of the rulings
f the courts and make it impossible for inferior tribunals to ad-
udicate controversies in reliance on the decisions of this court.
o nullify more than fifty decisions, five of them by this court,
me of which have stood for a decade, in order to change a mere
le of statutory construction, seems to me an altogether unwise
d unjustified exertion of power. As I shall point out, there is
necessity for such action because it has been, and still is open to
ongress to change the rule by amendment of the statute, if it
ems such action necessary in the public interest.

3. § 301 of the Revenue Act of 1926 imposes a tax upon the
lue of the net estate of a decedent. § 302 provides the method
r determining the value of the gross estate. Subsections (c) (d)
) (f) and (g) require inclusion in the gross estate of interests
hich otherwise might be held not to form a part of the decedent's
tate or not to pass from him to others at his death. These sub-
ctions sweep such interests into the gross estate in order to fore-
ll tax avoidance. § 302(c) was the successor of analogous sec-
ns in earlier acts and the predecessor of similar sections in later
ts.[10] The subsection has been amended in successive Revenue
ts. As a result of the Treasury's experience in the enforcement
the law, Congress has from time to time thought it necessary to
tend the scope of the subsection in the interest of more efficient

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; Welch v. Hassett, 90 F. (2d) 833; United States v. Nichols, 92 F. (2d)
; Mackay v. Commissioner, 94 F. (2d) 558; Commissioner v. Grosse, 100 F.
) 37; Commissioner v. Hallock, 102 F. (2d) 1; Commissioner v. Kaplan,
F. (2d) 329; Rothensies v. Cassell, 103 F. (2d) 834; Corning v. Commis-
er, 104 F. (2d) 329; Rheinstrom v. Commissioner, 105 F. (2d) 642.

[10] Revenue Act of 1916, § 202(b), 39 Stat. 756, 777; Revenue Act of 1918,
2(c), 40 Stat. 1057, 1097; Revenue Act of 1924, § 302(c), 43 Stat. 253,
; Revenue Act of 1932, § 803(a), 47 Stat. 169, 279; Internal Revenue Code
1939, § 811(c), 53 Stat., Part 1, 1, 121.

administration. Within constitutional limits such extension is a matter of legislative policy for Congress alone.[11]

It is familiar practice for Congress to amend a statute to obviate a construction given it by the courts. The legislative history of § 302(c) demonstrates that Congress has elected not to make such an amendment to meet the construction placed upon it by this court in the *St. Louis* cases.

May v. *Heiner* was decided in 1930. The Treasury was dissatisfied with the decision and in three later cases attacked the ruling, amongst them *McCormick* v. *Burnet*. The court announced its judgments in these cases on March 2, 1931, reaffirming *May* v. *Heiner*. On the following day Congress adopted a joint resolution amending § 302(c) to tax a transfer with reservation of a life estate to the grantor, but, in so doing, it omitted to deal with a contingent interest reserved to the grantor or the possibility of reverter remaining in him, involved in both *Heiner* and *McCormick*. See *Hassett* v. *Welch*, 303 U. S. 303, 308-9. The omission is significant.

It may be argued that in the haste of preparing and passing the amendment the point was overlooked. But the joint resolution was reenacted by § 803 of the Revenue Act of 1932,[12] without any alteration to cover the point. The Revenue Act of 1934[13] amended § 302(d) of the Revenue Act of 1926 but did not change § 302(c) as it then stood.

The day the *St. Louis* cases were decided, this court announced its opinion in *White* v. *Poor*, 296 U. S. 98, construing § 302(d) of the Act of 1926. In order to make the section apply to such a situation as was disclosed in that case[14] the Congress, on June 22, 1936, by the Act of 1936,[15] amended it to preclude the construction the court had given it. Again Congress let § 302(c) stand as before and as construed in the *St. Louis* cases. Three revenue acts have since been adopted,[16] in none of which has the wording of §302(c) been altered. If there is any life in the doctrine often an-

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[11] Helvering v. City Bank Farmers Trust Co., 296 U. S. 85.

[12] 47 Stat. 169, 279.

[13] 48 Stat. 680, 752.

[14] House Report on H. R. 12793.

[15] 49 Stat. 1648, 1744.

[16] Revenue Act of 1937, 50 Stat. 813; Revenue Act of 1938, 52 Stat. 447; Internal Revenue Code, 53 Stat., Part 1, p. 1.

ounced that reenactment of a statute as uniformly construed by he courts is an adoption by Congress of the construction given it, his legislative history ought to be conclusive that the statute, as it ow stands, means what this court has said it means.

Little weight can be given to the argument of the Government hat the Treasury has not applied to Congress for alteration of the ection because of the difficulty of wording a satisfactory amendment. A moment's reflection will show that it would be easy to hrase such an amendment. Whatever the reason for the failure o amend § 302(c), whether hesitancy on the part of the Treasury o recommend such action, or the satisfaction of Congress with the onstruction put upon the section by this court, or mere inadvertence, the fact remains that the section has been reenacted again and gain with the courts' construction plain for all to read.

4. As shown by the matter above quoted from the Treasury egulations affecting the estate tax,[17] a contingent interest is not o be included in the taxable estate. In the light of this construcon, estate tax provisions were reenacted or amended in 1921, 1924, 926, 1928, 1931, 1932, 1934, 1935, 1936 and 1937.

At the bar counsel for the Government stated that it had always een the view of the Treasury that the article in question applied nly to § 302(a) and had no application to § 302(c). But we are ot concerned with what the Treasury thought about the matter. he regulations were issued to guide taxpayers in complying with he Act. Section 302 is an entirety. Subsections (a) and (c) were ot intended to contradict each other, but the latter was to supplement the former. The gross estate was to be computed according the section as a whole. It is hard to understand how the taxayer was expected to discriminate between a contingent interest a decedent under the will of his grandmother and a similar inrest under an absolute deed executed by him *inter vivos*. If the e did not pass from the decedent at death neither did the other. After the decisions in the *St. Louis* cases, the Treasury rendered regulations even more explicit. In Regulations 80 (Revised), omulgated October 26, 1937, a new Article 17 was inserted which

"The statutory phrase, 'a transfer . . . intended to take effect possession or enjoyment at or after his death,' includes a transfer

[17] See Note 3, *supra*.

by the decedent . . . whereby and to the extent that the benef title to the property . . . or the legal title thereto . . . re mained in the decedent at the time of his death and the pass thereof was subject to the condition precedent of his death. . .

"On the other hand, if, as a result of the transfer, there remain in the decedent at the time of his death no title or interest in t transferred property, then no part of the property is to be inclu in the gross estate merely by reason of a provision in the instr ment of transfer to the effect that the property was to revert to t decedent upon the predecease of some other person or persons the happening of some other event."

If theretofore doubt could have been entertained, it then m have vanished. And with this regulation in force, Congress re acted § 302(c) as so interpreted.

What, then, is to be said of the principle that reenactment of statute which the Treasury, by its regulations, has interpreted a given sense is an embodiment of the interpretation in the law reenacted? Surely the principle cannot be avoided, as the Govern ment argues, because the Treasury felt bound so to interp § 302(c) by reason of this court's decisions. That fact shoul make application of the principle the more urgent.

Mr. Justice McReynolds joins in this opinion.

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